

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

United States Court of Appeals
for the District of Columbia Circuit

Brief for Appellant

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IN THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

18,786

DAVID A. KEYS, JR.,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

Appeal from Judgment of the United States
District Court for the District of Columbia

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By Appointment of this Court

(i)

STATEMENT OF QUESTIONS PRESENTED

1. In a first degree murder case, the prosecutor argued to the jury that the result of a verdict of not guilty by reason of insanity might be only a short confinement in a mental hospital and insinuated that such would be the practical effect of such a verdict by stressing, in reference to the probable duration of a confinement, that the two medical officials at St. Elizabeths Hospital who would determine his qualifications for release had already formed the opinion that he was sane. The question presented is whether in view of the absence of any prompt curative action by the trial court these comments of the prosecutor were so prejudicial as to have deprived appellant of his rights to a fair trial.

2. Whether the evidence that appellant suffered from a mental illness and that the offenses charged were the product of that illness was so strong that a reasonable mind must necessarily have entertained a reasonable doubt as to appellant's criminal responsibility for those offenses, and hence that a judgment of acquittal by reason of insanity should have been directed by the court.

3. Whether, in view of the substantial evidence in support of the defense of insanity raised in this case, the trial court's instruction to the jury that "the presumption of sanity . . . remains in the case and is to be considered by you along with all other evidence on the issue of sanity" as well as equivocal instructions on burden of proof constituted reversible error.

4. Whether appellant's right to a poll of the jury was violated by the trial court's order that printed forms on which jurors had indicated their verdicts should be returned to them so that they might refer to them on being polled, without clearly indicating that they were not bound by their previous vote but were being asked for their verdict as of the time of the polling.

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Quercia v. United States, 289 U.S. 466 (1933).	30
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State v. Johnson, 267 S.W.2d 642 (Mo. 1954).	30
* Stewart v. United States, 94 U.S.App.D.C.293, 214 F.2d 879 (1954).	39,40
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Stewart v. United States, 107 U.S.App.D.C. 159, 275 F.2d 617 (1960).	39
* Tatum v. United States, 88 U.S.App.D.C.386, 190 F.2d 612 (1951).	41
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United States v. Fielding, 148 F. Supp. 46 (D. D.C.), rev'd. on other grounds, 102 U.S. App. D.C. 167, 251 F.2d 878 (1957).	41
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United States v. Marzano, 149 F.2d 923, (2d Cir. 1945).	30
Wright v. United States, 102 U.S.App. D.C. 36, 250 F.2d 4 (1957).	34

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American Bar Foundation, <u>The Mentally Disabled and the Law</u> (1961).	39
44 American Law Reports, Second Series (1955).	30
2 American Law Reports, Second Series, Supplement (1960).	30
3 American Law Reports, Second Series, Supplement (1962).	30
American Psychiatric Association, <u>Diagnostic and Statistical Manual: Mental Disorders</u> (1952).	11
1 Jones, <u>Evidence</u> (5th ed. 1958).	42
5 Wharton, <u>Criminal Law and Procedure</u> (1957).	46
9 Wigmore, <u>Evidence</u> (3d ed. 1940).	42

* Cases or authorities chiefly relied upon are marked by asterisks.

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Appeal from Judgment of the United States
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Brief for Appellant

JURISDICTIONAL STATEMENT

Appellant was convicted on June 18, 1964 in the United States District Court for the District of Columbia (McGarraghy, J.) on a first count of first degree murder (22 D.C. Code (1961) § 2401) and two other counts of assault with a dangerous weapon (22 D.C. Code (1961) § 502). He was sentenced on July 2, 1964 to life imprisonment on Count One and to concurrent terms of 40 months to ten years on the other two counts, the latter sentences to run concurrently with the sentence on Count One. On July 8, 1964, the District Court granted leave to appeal in forma pauperis. This Court has jurisdiction of the appeal under 28 U.S.C. §§ 1291, 1294 (1958).

STATEMENT OF THE CASE

A. Introductory Statement

On November 26, 1962, appellant was indicted for murder in the first degree in the death of his wife, Priscilla Keys, on November 7, 1962, at 807 Florida Avenue, N. W., Washington, D. C. He was also indicted for assault with a dangerous weapon upon two other women, Minnie Coles and Vernell Saunders, at the same time and place. Appellant's motion to proceed without prepayment of costs was granted, and Denis K. Lane was appointed as his counsel. He was arraigned on November 30, 1962, and pleaded not guilty.

On January 4, 1963, the court granted appellant's motion for a mental examination and committed him to St. Elizabeths Hospital for 90 days. On March 29, 1963, the Superintendent of St. Elizabeths certified that appellant was competent to stand trial and that he was free of any mental disease or defect on November 7, 1962. On October 1, 1963, Mr. Lane moved for recommitment to St. Elizabeths on the ground that the report from the Superintendent had not been based on unanimous opinions of the government doctors. The recommitment motion was granted and on January 9, 1964, the Superintendent again certified that appellant was not mentally ill at the time of the alleged offenses and was competent to stand trial. The trial commenced on June 10, 1964 and was completed on June 18, 1964. 1/

1/ The record discloses that the delay of approximately 19 months between arraignment and trial was occasioned mainly by the mental examinations and by requests for continuances by defense counsel primarily for additional time to obtain the attendance of witnesses. Requests by the Government for continuances accounted for only 43 days of the total period. Neither appellant nor his counsel requested an earlier trial.

Eleven veniremen who indicated in the voir dire that they were opposed to the death penalty and that it would affect their ability to render a fair verdict were excused for cause over defense counsel's objection that defendant was being deprived of a fair cross-section of the community (Supplementary Tr. 11-18). This objection was held to be without merit in Turberville v. United States, 112 U.S. App. D.C. 400, 303 F.2d 411 (1962), cert. denied, 370 U.S. 946 (1962).

B. Commission of the Offenses

Although no issue on this appeal directly concerns appellant's physical participation in the offenses of which he was found guilty, a summary of the evidence on this point is pertinent as background to the consideration of the other issues which are involved in this appeal.

Appellant was married to Priscilla Keys in May, 1962. This was his second marriage, his first wife having died in September, 1957. (Tr. 180.) The marriage with Priscilla was unsuccessful from the beginning and they were separated the first time within a few months after their marriage. (Tr. 25, 39-40.) On November 3, 1962, Priscilla told her father that she and appellant had again agreed to separate. Appellant also told her father that they were going their separate ways and that he was not "going to bother with her any more." She moved to the apartment where her father and his common law wife, Minnie Coles, were living (Tr. 25-27).

On the morning of November 7, 1962, soon after Priscilla and her father left to go to the Uptown Shrimp Hut, a restaurant which he owned and in which she worked as a waitress, appellant appeared at her apartment, knocked loudly on the door, asked for Priscilla, and left upon being told by Minnie Coles that she did not know where Priscilla was. (Tr. 46-47, 59-63.) Later, appellant went to the Uptown Shrimp Hut and talked with Priscilla. According to her father, appellant seemed happy to see her. He testified that there was no difficulty or any argument at that time between the two of them. (Tr. 36-37, 40.) The conversation, which opened with appellant's remark: "Well, this sure takes a load off my mind," appeared to be amiable (Tr. 31). Shortly thereafter, when Minnie Coles arrived at the restaurant to work in the kitchen, she reproached

him for knocking at her apartment earlier that morning. He apologized, and embraced her. (Tr. 48.) She testified that there had never been any trouble between them. (Tr. 63.)

Vernell Saunders, a cook and helper at the restaurant, was present while appellant was in the restaurant. She testified she had never met or seen him before. He remained at the restaurant for a couple of hours and, upon leaving, stated that he would see them later. (Tr. 48, 78-79.) Priscilla's father, who had left the restaurant while appellant was still there, returned after appellant had departed and was assured by Priscilla that everything was satisfactory (Tr.31).

Several witnesses testified that appellant returned to the restaurant about 10:00 A.M., carrying a shotgun. Vernell Saunders was stationed behind the counter in the front section of the restaurant and Minnie Coles was in a rear kitchen behind a screen door. Priscilla had gone downstairs into the basement to rest. Appellant asked where Priscilla was, and upon being told by Minnie Coles that she was gone, asked again, looking in the direction of Vernell Saunders. She told him she had been busy and didn't know whether Priscilla had left or not (Tr. 70). After calling Mrs. Coles a foul name, he said: "Open up the door, Minnie, I got something for you," and then fired a shot through the screen door to the kitchen, striking Minnie in the hand. (Tr. 50, 70.) He then turned and shot Vernell Saunders in the shoulder (Tr. 71-72). Both Minnie and Vernell ran from the restaurant after observing appellant going down into the basement (Tr. 54-55, 72-73).

A few minutes later, appellant was seen walking down the street carrying a shotgun (Tr. 74,83). He did not appear to be in a hurry (Tr. 80). He hailed a taxicab several blocks from the restaurant and told the driver that he had

just killed three people. He then stated: "I ought to turn myself in Carry me to the nearest precinct." (Tr. 85-86.) As appellant got out of the taxicab and was at the point of entering the police station to surrender, he was arrested by two officers who had been following in another car. (Tr. 101,109.) Both officers testified that appellant "was perspiring a little bit, nervous, and in order to calm him down, we just told him what he had done wasn't too bad, he had only shot the woman in the hand." (Tr. 104, 118.) Over the objection of appellant's counsel, the trial judge permitted the officers to testify that appellant replied: "Well, I shot two other women (Tr. 104) . . . I shot my wife and she is down in the basement. Better get an ambulance. I don't think she is going to make it." (Tr. 105. See also Tr. 119.) 2/

Priscilla Keys' body was later discovered in the basement of the restaurant next to several shotgun shells, two of which were expended. (Tr. 126-139.) Death was caused by a shotgun wound in the head. (Tr. 150-151.)

Part of a shotgun barrel, part of a stock, and a hacksaw and blade were found by the police in an apartment where appellant had been living (Tr. 145-146). A government witness testified that the shells in the restaurant and the severed barrel and stock seized in the apartment came from the shotgun carried by appellant when he was arrested. (Tr. 157-161.)

C. Appellant's Mental Condition

Appellant's principal defense at the trial was insanity. Both lay and expert evidence was adduced as to his mental condition on November 7, 1962, the date on which the offenses charged were committed.

2/ Appellant's counsel objected to this testimony on the ground that appellant's oral admission after his arrest was illegally induced by the officers' statements that he had only wounded one woman. One of the two officers present testified that the appellant was not coerced into making these statements (Tr. 119). The other officer claimed that they were unaware when they made these statements that appellant's wife also had been shot (Tr. 106).

1. Lay Testimony

The evidence disclosed that while in the 11th grade of schooling, appellant entered the Army. His military service extended over nine years, two of which were in the war in Korea. In 1955, he married a childhood sweetheart from his hometown in North Carolina and took her to Germany where he was stationed. He was apparently very much in love with his wife and the marriage was a happy one. In September, 1957, when the youngest of their two children was less than three months old, appellant found his wife lying near the kitchen stove. She died shortly thereafter in an Army hospital, the death being attributed to carbon monoxide poisoning. The testimony indicates that she committed suicide (Tr. 174-180, 346).

Soon after her death and his return to this country with her body for burial, appellant's personality and conduct underwent a noticeable change. In November, 1957, he was honorably discharged from the Army with the rank of Sergeant First Class. (Tr. 176-177, 180-181). The discharge was characterized by a witness as "for medical reasons, inaptitude to perform his work." (Tr. 381-382.) He then shifted from one occupation to another. He attended a beautician school and became a hair stylist but did not pursue that occupation because, as his father testified, he was "seemingly too nervous for the work . . . [I]t seemed like the boy was never the same again. He could never really . . . get himself adjusted." His parents moved from North Carolina to Washington, D. C. to take over the care of appellant's children in order to "try to alleviate his burden . . . to help him adjust himself to life." (Tr. 180-183, 240.)

Various incidents delineating the change in appellant's mental character after his first wife's death were described at the trial. On many occasions, appellant was found engrossed for long periods of time at night, staring at

pictures of his deceased wife and his young children (Tr. 185-186). Three witnesses testified that appellant told them at various times that he had visions of his deceased wife visiting him and talking to him at night and that these visions appeared to be real so far as appellant was concerned (Tr. 227-228, 244, 267). One of his sisters, with whom he was then living in New York City, testified that in 1958 or 1959 appellant told her he "had problems"; that he would "jump up at night, turn the light on, and see if he could see anything in the room and look under his bed" (Tr. 266-267).

Other witnesses testified that he told them he heard noises at night (Tr. 232-244). He told one of his sisters that he did not believe his first wife was dead (Tr. 249). This sister testified that appellant had become a "very disturbed person" (Tr. 241). Another sister testified that he had become very nervous and depressed, that he looked tired and had lost weight (Tr. 269-276). She also testified that he teased his children "excessively" and drank "excessively" (Tr. 286).

Appellant told one of his sisters that the reason he moved from job to job was because he was "nervous" and that he could not become a hair stylist, even though he had completed a course of training in that occupation, because "women made him nervous." (Tr. 243, 256-257.) This sister told of his getting dressed in preparation for going to church, then changing his mind because "people would make him nervous" (Tr. 241-243). He became abusive to his parents and on one occasion threatened to "whip" his father. (Tr. 184-187.)

Witnesses also testified with respect to his lapses of memory. Although he had lived in New York City for several years, he told a friend on a subsequent visit that he did not remember ever being there previously (Tr. 233). When his parents called attention to abusive actions on his part, he expressed

sorrow and stated that he could not remember them (Tr. 184). Witnesses testified that appellant would forget that he had left a car double-parked on the street, and that, only a few days after an automobile accident, he had forgotten the occurrence completely (Tr. 231,244).

Appellant apparently was indecisive about entering into his second marriage (Tr. 207), which was unsatisfactory from the beginning. Priscilla's father testified they were dissatisfied with each other and "couldn't get along on account of confusion" (Tr. 25.)

On June 26, 1962, about a month or two after the marriage, appellant attempted to take rat poison but was stopped by his younger brother (Tr. 188-189). The father, who was summoned by the younger brother, recounted his conversation with appellant, as follows:

"Son what is the matter with you?
He broke down in tears. Said: Daddy you don't understand. Says I am sick. I said: Well, son, since you say you are sick, I know you are, been knowing it for a long while. I says: What you need is mental treatment. I said: I have been hating to tell you about this but, I said, you need mental treatment. Why not call VA and ask them if they will help you? He said: Well, VA won't listen. Says: No one listen to me. Says: you won't listen. Said: You don't understand. I said: Well, son, I tell you what you do. I said: You set here until I return." (Tr. 189-190)

Appellant's father then went to a nearby police station and discussed his son's condition with the desk sergeant. On the latter's advice, the father took appellant to D. C. General Hospital about 4:00 A.M. where he was admitted as a psychiatric patient. (Tr. 190, 191, 406-D.) The report of the Assistant Chief Psychiatrist of the Hospital states that "On admission to the Service patient was depressed, prone to weep quietly." (Tr. 626). The report also shows that appellant expressed fear that he might do something to his wife and that he had suicidal tendencies (Tr. 619-620). Two days later, appellant effected his release on his own responsibility. (Tr. 406-F.)

2. Expert Testimony

The only expert testimony presented was that of members of the staff of St. Elizabeths Hospital who had evaluated appellant's condition in the course of their official duties and had reached conflicting opinions. Three psychiatrists (Drs. David H. Dabney, Wilbur A. Hamman, and Charles F. Agler) and the clinical psychologist, Dr. Eugene C. Stammeyer, determined that appellant was mentally ill at the time of the alleged crimes and that the offenses charged against him were produced by his illness. Drs. David J. Owens, Mauris M. Platkin and Dorothy S. Dobbs, on the other hand, concluded that appellant's condition did not amount to a mental disease.

Drs. Owens and Platkin, who were, respectively, Clinical Director and Chief of Service of the Maximum Security Unit, together met with appellant for 30 or 45 minutes soon after he was admitted in January, 1963 in order to determine whether or not he was capable of understanding and executing certain legal documents relating to the custody of his children (Tr. 548-550, 610-611). In addition to this occasion, Drs. Owens and Platkin observed appellant only at two staff conferences, the first of which was held on March 27, 1963, the second on January 6, 1964. Each of these conferences convened for about one hour with appellant being present for approximately 45 minutes (E.g., Tr. 329, 592). Drs. Dabney, Hamman and Stammeyer were present at both conferences; Dr. Dobbs only at the first; and Dr. Agler only at the second. (Tr. 572-573.)

Dr. Hamman, who had interviewed appellant several times prior to the first staff conference (Tr. 379) and had given appellant a "psychiatric examination throughout the period of his hospitalization" (Tr. 631) was responsible for the preparation of the only psychiatric evaluation or case study of appellant

(Tr. 546-547). Dr. Stammeyer saw appellant on several different occasions when he administered a battery of standard psychological tests (Tr. 453-454).^{3/}

(a.) Testimony for the Defense

Dr. Dabney testified that as of November 7, 1962, appellant "was suffering from . . . a severe type of personality disorder . . . called a paranoid personality disorder" (Tr. 320.) He distinguished this condition from a psychosis and neurosis as follows:

"In this sense, the paranoid personality is on the same continuum, the same line as that seen where an individual is suffering from what you call paranoid schizophrenia. What I saw in this man is actually all of the bit that is seen in the paranoid type of schizophrenia, except for the delusions which are not out of the context of reality and absence of voices. As far as ideas of reference, . . . in terms of other people talking about him, plotting against him, scheming against him, planning to do him harm, especially where these would be impervious to any logical reasoning, despite a person's attempts to dissuade him from this type of thinking, I saw all of these in this man's personality." (Tr. 331-332).

He further explained that:

"The individual of this type becomes very dependent upon what you call one or two individuals. These individuals tend to place -- he or she tends to place that individual on a pedestal, idealize them. Then when this person does not fit the ideal consistently, perpetually, the individual sees this person as having feet of clay. * * * The individual then finds this intolerable. He then wishes psychologically to destroy the total person, the total idol, because this person then has these defects, the defects he cannot tolerate because he sees in the person the same deficiencies he sees within himself.

^{3/} The material, either written or oral, which was available at the two staff conferences included a "note" made by a resident doctor at the time appellant was admitted; the psychiatric evaluation or case study prepared by Dr. Hamman; the results of the psychological tests conducted by Dr. Stammeyer; the report of a social worker's interview with appellant's parents, the extent of which is not revealed; laboratory data derived from a physical examination of appellant; and records of the Army and of Bethesda Naval Hospital (Tr. 369, 538, 593). "Ward notes" dealing with appellant's conduct at St. Elizabeths may also have been available (Tr. 339-340).

"He then magnifies, exaggerates, over-emphasizes any faults, any mistakes, any errors in judgment, any statements that this particular individual who has fallen from the ideal picture presents. He then becomes markedly suspicious, markedly hypersensitive, has ideas of reference The paranoid personality does not trust anyone." (Tr. 350-351.)

In Dr. Dabney's opinion, appellant's problems "began during his first marriage . . . when he found his first wife in the kitchen one day, and she was considered a suicide." (Tr. 346.) "I think he had a great deal of guilt feeling behind the situation. Although he may not have been actually responsible for this, he may have felt that had he paid more attention or had not overlooked certain items in their relationship, maybe could have prevented it." (Tr. 348.) Dr. Dabney illustrated appellant's condition by pointing out that " . . . underneath the superficial surface of serenity is a burning caldron which usually erupts on the surface in some explosive, detrimental, tragic behavior." (Tr. 355.) According to Dr. Dabney, appellant had "a personality disorder of the severest type." (Tr. 332.)

Dr. Hamman, who, as stated above, was the only psychiatrist who had prepared a case study based on his lengthy psychiatric examination of appellant, expressed the opinion that appellant was suffering from a severe character neurosis referred to in The Diagnostic Manual of the American Psychiatric Association as a personality pattern disturbance (Tr. 372). ^{4/} He testified that appellant showed a passive-aggressive personality (Tr. 385). ^{5/} In his

^{4/} See American Psychiatric Association, Diagnostic and Statistical Manual: Mental Disorders, p. 35 (1952).

^{5/} Dr. Hamman explained that the Manual (Id. at pp. 36-37) further classifies a personality disorder as, inter alia, a passive-aggressive personality, which "is broken down into three categories The passive dependent type, the passive aggressive type, and the aggressive type, and this is the description of how this individual handles the conflicts that he has." (Tr. 385.) Earlier in his testimony, Dr. Hamman had subclassified appellant's mental disorder as a "passive dependent" type. (Tr. 373. See also Tr. 562.)

opinion, appellant had responded to rejection in his childhood by becoming very dependent while at the same time experiencing a great deal of hostility which he was unable, because of his personality disorder, to express openly, especially against those persons who failed to meet his dependency. He testified further that it was characteristic of this type of individual to appear outwardly normal (Tr. 373-374). He stated that in his opinion "there is a definite causal relation between the acts [on November 7] and the mental illness" (Tr. 377).

Similar conclusions were reached by Dr. Agler. He testified that appellant had a "passive-aggressive personality disorder" which is a recognized form of illness within the field of psychiatry. (Tr. 413.) According to Dr. Agler,

"People with this disease . . . feel a good deal of inner hostility and frustration . . . Occasionally, when people whom they have found to satisfy their needs fail them, they may react with intense hostility which may be quite inappropriate . . . There is also intense anxiety. Usually, people with this illness, if they marry, in their marriage expect a great deal of dependency gratification from their mate and ordinarily this is provided. If it is removed, or poorly given, they usually feel quite threatened, quite anxious and quite angry, and they may seize upon suicide as the answer to their problem.

"They are usually quite overwhelmed by the lack of satisfaction or threatened separation. And we feel that there is a close relationship between suicide and murder." (Tr. 414-415.)

Dr. Agler further testified that persons such as appellant with these symptoms may "assault, not necessarily kill . . . people whom they feel are depriving them, whom they have come to feel have no right to deprive them, such as mates or members of the family, or they may internalize and inflict damage on themselves, including suicide." (Tr. 417.) ^{6/}

^{6/} On cross-examination, Dr. Agler expressed some uncertainty on causation to the extent of stating that, while he was of the opinion that appellant's mental illness was "a potentially precipitating cause" and that productivity was the "likely possibility" and that "evidence points in the direction of productivity," he was not prepared to state with certainty whether or not the alleged crimes were a product of the disease. (Tr. 418-420, 442.) His hesitancy was attributed to the fact that he had not done the psychiatric examination himself. As he stated, "If I had made the findings myself, I might be willing to say that I felt that there was productivity." (Tr. 442.)

Dr. Stammeyer saw appellant on February 27, 1963, when he administered the Wechsler Adult Intelligence Scale, the Wechsler Memory Scale Form 1, and the Bender-Gestalt Test. On March 22, 1963, he gave appellant the Rorschach Test, the Thematic Apperception Test, and the Projective Drawings Test. He administered the Rorschach Test a second time on December 16, 1963. (Tr. 453-454.)

He testified that the results of the Wechsler Adult Intelligence Scale showed that appellant's "overall score full-scale I.Q. was 78 . . . [which placed him] within the borderline defective range." (Tr. 460). Appellant's score on the Wechsler Memory Scale, used specifically to measure memory, fell at the "lower extreme of the dull normal range." (Tr. 461.) The Bender-Gestalt Test - a standardized test not only at St. Elizabeths but throughout the country and internationally (Tr. 463) - revealed appellant to be "an individual who has a considerable amount of difficulty in dealing with hostility and aggressiveness" (Tr. 462). With respect to certain representations of appellant in the Projective Drawings Test, Dr. Stammeyer stated:

"These aspects I have never really seen ^{7/} in any case except in the most pathologically disturbed people. * * * [E]mpirically I have never obtained this type of drawing except from a person who is very seriously disturbed." (Tr. 520-521.)

Dr. Stammeyer further testified that:

"The outstanding characteristic of Mr. Keys' Rorschach response was its meager unproductive quality that pictured a weak dependent chronically depressed person who seems to appear, have feelings of helplessness in an intentionally hostile environment.

"He is overtly a passive compliant person, but beneath this all this harbors a considerable amount of hostility, apparently, and inner

^{7/} At the time he testified, Dr. Stammeyer had been employed at St. Elizabeths Hospital for nine years. For the last five, he had been clinical psychologist at the John Howard Pavilion (Tr. 449).

tension and conflict regarding his own passivity and inability to function more adequately. He does not easily react in this passive compliant fashion, but this is his way of adjusting, he must, he feels, in order to make any type of adjustment.

"And I felt that the test indicated that personality resources were quite inadequate to cope with external stress and that as stress increased, inner tensions were likely to build up and a potential for discharging tensions in a potentially destructive fashion is apparent." (Tr. 465-466).

Dr. Stammeyer summarized his findings as follows:

"[Appellant's] basic personality structure appears to be that of a very insecure passive-dependent individual. Although fearful and reticent to openly express his feelings, the patient appears to be a hypersensitive individual who harbors considerable hostility and resentment toward his own passivity and ineffectiveness as well as toward others. Personality resources are too meager to cope with much stress from his surroundings, and if tensions do build up behavioral outbursts potentially dangerous to himself as well as to others could readily occur." (Tr. 552).

Dr. Stammeyer expressed the opinion, based primarily on the tests which he had administered but also on his personal observations and on appellant's history (Tr. 523, 472), that the latter was "functioning from a mental disorder that could best be classified as passive aggressive personality, passive dependent type" and that he believed appellant's acts on November 7, 1962 "were a product of his mental disorder." (Tr. 471). He considered appellant to be "so driven by his resentment and his built up hostility, and his aggressive-built up aggressions, that he could no longer control his behavior." (Tr. 525).

In his closing argument to the jury, the prosecutor, referring to the psychiatric testimony for the defense said:

"[T]he only thing that anybody says is wrong with him is a personality problem, which the hospital did not even recognize as a mental illness . . . - and Dr. Dabney even admitted that - up until 1957. They didn't even consider it a mental illness at all." (Tr. 686).

He further stated that:

"The fact is that this type of illness was never even recognized at St. Elizabeths Hospital until a few years ago." (Tr. 715.)

Appellant's counsel objected to that statement on the ground that it was not supported by any testimony in the record (Tr. 715). The record shows that Dr. Hamman, when asked by the prosecutor whether it was a fact that personality disorders were not recognized "as a mental illness" at St. Elizabeths Hospital until 1957, answered that the hospital "did not consider a sociopathic personality to be a mental illness until 1957, but this was limited only to the sociopathic personality, not to the personality disturbances as a group." (Tr. 387.) Dr. Dabney testified that a personality disorder was recognized as a mental illness at St. Elizabeths before 1953, that "it has been recognized since the middle of the Nineteenth Century." (Tr. 332-333.)

(b). Testimony for the Prosecution

Dr. Platkin stated that he had formed the opinion that appellant was not suffering from a mental illness or defect on November 7, 1962, because he could not find any "symptoms" of mental illness or defect (Tr. 539, 541-542). 8/ He agreed that the psychological tests administered by Dr. Stammeyer to appellant

8/ When Dr. Hamman was questioned as to the existence of bizarre conduct or other "symptoms" on which he based his opinion of mental illness, he stated that a diagnosis of personality disorder is not made on the basis of symptoms, since they cannot be seen in this type of case; instead, the diagnosis properly is based "on the person's life history, on his pattern, on his way of relating to people . . . now and how he has related to them in the past." (Tr. 389-390.)

In response to the prosecutor's query as to why appellant had appeared to be "peacefully enjoying a cup of coffee" at the restaurant several hours before the alleged crimes occurred, Dr. Dabney stated: "This is the type of individual who is seclusive, who is withdrawn and who is aloof. This is considered by most people as being quiet and unassuming, but underneath the superficial surface of serenity is a burning cauldron which usually erupts on the surface in some explosive, detrimental, tragic behavior. No telling what thoughts were running through this man's mind." (Tr. 354-355.)

were "accepted tests" and had been given by a trained clinical psychologist. Dr. Platkin conceded the absence of any qualifications on his own part to evaluate the responses to these tests (Tr. 564-566). Moreover, he did not dispute the findings that appellant had a number of emotional difficulties, feelings of insecurity, passivity, dependency, certain hostilities, certain problems of coping with stress, etc. He went on, however, to state that:

"It is quite possible to have this sort of situation in an individual who, nevertheless, is not in my opinion suffering from a mental illness." (Tr. 578.) 9/

During his direct examination, Dr. Platkin stated that he had examined appellant for about 45 minutes "in connection with some matter, some personal matter, that had arisen at the time," (Tr. 535) referring to the meeting which he and Dr. Owens had with appellant in order to determine whether the latter had sufficient understanding of a certain legal document concerning the custody of his children to be capable legally of executing it. On cross-examination, however, he admitted he had "no recollection" or notes of this meeting; that "the actual purpose" of his visit concerned "the actual document, itself";

9/ Dr. Platkin testified that he believed that at the second staff conference appellant was "malingering" (trying to create an impression that did not actually exist) when he told of hearing voices, of seeing visions, and claiming a loss of memory (Tr. 537). Dr. Owens expressed a similar view (Tr. 613). He testified also that the "other members of the [second] staff conference" believed appellant was malingering (Tr. 613). The prosecutor in his closing argument to the jury stated that "all the government doctors who were at the second conference said the same thing, that the Defendant was obviously malingering" (Tr. 685.) However, Dr. Platkin admitted that "it is possible" that appellant was not malingering but instead telling the truth at the second staff conference (Tr. 552). Drs. Hamman, Agler and Stammeyer expressed doubt that there was any malingering by appellant. Dr. Hamman added that in any event it was not significant since "many patients malingers under these circumstances." (Tr. 403, 421-422, 478-480.) Dr. Dabney testified that in his opinion no evidence of malingering was found (Tr. 358).

and that "in a specific direct sense" his visit "had nothing to do with this Court or this case or anything of that nature." (Tr. 548-549.) He insisted, nevertheless, that he was afforded the opportunity to determine "whether he knows what is going on around him, whether he can respond intelligently to what I am saying, whether he understands the particular questions that are raised at that time, whether he is aware of where he is, perhaps why he was sent there. Many such questions . . . to me have very important psychiatric value even though the purpose of my visit may be to explain a particular legal document." (Tr. 549-550.) As previously stated, except for this short interview, Dr. Platkin observed appellant only at the two staff conferences.

Dr. Platkin was questioned about the fact that 400 mgs. of Equanil, a tranquilizer, had been administered to appellant twice a day for several weeks prior to the first staff conference, together with 1/2 gram of Placidyl at bedtime as required. (Tr. 365, 406-C, 577.) He denied that "in general" this medicine would have had a significant effect upon the actions of a patient who was undergoing a psychological evaluation test, but he admitted that it was preferable not to use tranquilizers under the circumstances (Tr. 569-570). Dr. Hamman testified that appellant should not have been on any tranquilizers, and that "invariably we avoid giving tranquilizing drugs to our patients who are sent there for observation, because they tend to mask [sic, presumably mask] symptoms." (Tr. 406-B, 406-C.)

Dr. Dobbs, who participated in the first but not the second staff conference, testified for the prosecution that she "did not find sufficient signs or symptoms of mental illness to arrive at an opinion that [appellant] had one." (Tr. 596.) She stated that "for all practical purposes, I saw him on one occasion, at the time of our staff conference in March of 1963. * * * I would estimate that

[appellant] was actually present in the staff conference approximately forty-five minutes." (Tr. 591-592.) She stated on cross-examination that she had not read the case study or other reports on appellant prior to the conference but looked at the material during the conference and had become familiar with them by the end of the conference (Tr. 593-594).

Dr. Dobbs stated "that the psychologicals in this case gave . . . a very good picture of the kind of personality that [appellant] is and has" (Tr. 595), but that in her opinion the description does not amount to a mental illness (Tr. 599). Although she admitted that there is a type of mental illness recognized generally in the field of psychiatry and known at St. Elizabeths as passive-aggressive personality, passive-dependent type, she stated that it was not a mental illness in appellant's case because "in general he has differed in terms of his personality so little from a large segment of the population that it is not sufficient deviation to call it a mental illness." (Tr. 602-604.)

The final witness for the prosecution was Dr. Owens. He conceded that the study of appellant made by Dr. Hamman, one of the witnesses for the defense, was a "thorough, complete psychiatric case study" (Tr. 636) and he did not dispute the findings showing appellant as having a passive-aggressive personality, passive-dependent type (Tr. 617). He expressed the opinion, however, that this does not mean that appellant is necessarily mentally ill. He stated that possibly thirty per cent or twenty per cent of the people in the community

"may be diagnosed as having a passive-dependent personality. In other words, you can classify everybody in the community in some type of personality.* * * So we cannot possibly say that everybody in the community is mentally ill or everybody in the country is mentally ill. We have to say we all have personalities but personalities, in and of themselves, are not a mental illness. If a person has a passive-dependent personality, that is just a description of a personality, it is not necessarily a mental illness." (Tr. 617-618.)

It was his opinion, reached after the first staff conference at which he stated appellant exhibited no "bizarre conduct" and was "very cooperative" that he was not suffering from a mental disease. The second staff conference did not change his opinion (Tr. 611, 615). Dr. Owens summarized his views as follows:

"In certain rare cases you may see a personality disorder that has not approached psychosis that would be a mental illness, but I would say it would be extremely rare." (Tr. 650.)

* * *

"The difference between paranoid personality and paranoid schizophrenia is one is an illness and the other is not. . . . [G]enerally speaking paranoid personality is not a mental illness. If that were the case, we would have literally thousands of people in the community that would be diagnosed because they have this personality." (Tr. 654.)

Although the subject had not been broached by defense counsel, the prosecutor inquired of several of the expert witnesses whether in their opinion appellant knew the difference between right and wrong at the time of the commission of the offense. In response, Dr. Dabney expressed the opinion that appellant did not know right from wrong inasmuch as his concepts were so distorted that he "would have been unable to deter himself from the wrong" and "he did not have control of his thoughts in terms of thinking logically." Although in response to the question whether appellant was "irresistibly impelled" to do the acts charged, Dr. Dabney replied in the negative since he believed that if the "intensity of [appellant's] suspicion" had been relieved at the time he might not have committed the offenses charged, the doctor testified that if appellant's highly agitated state of mind had not been alleviated he probably would have committed violence even in the presence of a policeman (Tr. 352-356). Dr. Hamman answered the prosecutor's question as follows: he believed appellant knew the difference between right and wrong but that he may have acted on irresistible impulse since "he was extremely dependent on this woman and was a sick, morbid dependency, that he had been rejected, and he also felt in danger of his own life, and this

aggressive act was an outgrowth of his sick way of looking at things." (Tr. 404-405.) Dr. Stammeyer likewise expressed the opinion, in answer to the prosecutor's question, that appellant knew right from wrong, but stated that he could not have controlled his actions on November 7, 1962 (Tr. 524-525). Dr. Owens answered affirmatively that appellant knew right from wrong on November 7, 1962 and could have refrained from committing the acts charged against him (Tr. 618).

At the close of the government's rebuttal, counsel for the defense moved for a finding of not guilty or a finding of not guilty by reason of insanity, but the motion was denied (Tr. 660). 10/

D. Closing Arguments to the Jury

In his closing argument for the defense, counsel urged the jury to find appellant not guilty by reason of insanity, stating that in that event:

"[I]t does not mean that he is going to go out of this courthouse free. It means that maybe for a long, long, long, long time, until they find that he is no longer dangerous, that he is going to be kept in an institution provided by law." (Tr. 704-705.)

The prosecutor then told the court at a bench conference that he thought that counsel for the defense:

"[H]as opened up the door for me to argue to the jury that it may not necessarily be a long, long time. I don't want to do it without asking your honor's ruling first, because I think the jury is under a misapprehension at this point." (Tr. 706.)

The court asked defense counsel whether he agreed that prosecutor could make the argument and, when the defense counsel said "sure, he can argue," the court said "All right." (Tr. 706.) The prosecutor then later addressed the jury as follows:

10/ The court had previously denied a defense motion, made at the close of the government's case, for a finding of not guilty as to first degree murder (Tr. 173).

"I want to mention one very important thing to you. In view of the testimony of Doctor Owens, Doctor Platkin, and Doctor Dobbs, who have testified that this man is without mental illness, bear in mind that Doctor Owens is the Clinical Director of John Howard Pavilion. In other words, he runs the show over there.

"Doctor Platkin is the Chief of the John Howard Service, next in command.

"Ladies and gentlemen of the jury, what Mr. Lane is asking you to do is to acquit this defendant by reason of insanity in the face of the testimony of the Clinical Director of St. Elizabeths Hospital. He is asking you to acquit by reason of insanity over their testimony, doctors who are the superior doctors at the hospital.

"Now, I know you are not going to do that in the face of their testimony.

"And one other thing, while we are talking on the subject of the hospital: Mr. Lane has argued to you that a verdict by reason of insanity would send this defendant to St. Elizabeths for a very long time, until he was found no longer dangerous to himself or others.

"Now, on the contrary, such a verdict would well send him to St. Elizabeths, but not necessarily for a long time. If he was found no longer to be dangerous to himself or others, he could be released from that hospital in a short time, not a long time, but a short time.

"And when you are thinking about that, think again of the opinion of the Clinical Director and the Chief Staff Psychiatrist at that hospital. These are the two men who have overall control at the hospital, at the maximum security division.

"So, ladies and gentlemen of the jury, a verdict of not guilty by reason of insanity will not necessarily keep him there for any great length of time, and that is something for you to consider." (Tr. 717-718.)

E. Charge to the Jury

The court in its charge to the jury did not advert to the comments by counsel with respect to the possible duration of appellant's confinement in a mental hospital in the event he were found not guilty by reason of insanity. The only reference to this subject appears near the end of the charge. The court there stated that:

"If you find the defendant is not guilty by reason of insanity, the accused will be confined to a hospital for the mentally ill until the superintendent has certified and the Court is satisfied the Defendant has recovered his sanity and will not in the reasonable future be dangerous to himself or to others, in which event and at which time the Court shall order his release either unconditionally or under such conditions as to the Court seem fit." (Tr. 753.)

Defense counsel asked for an instruction on "diminished responsibility" which was denied by the court (Tr. 665-666).

When the jury interrupted its deliberations to request further instructions on several points, including the "[r]elationship of serious personality problems and productivity with respect to crime charged", defense counsel requested the court to include "a further elaboration of irresistible impulse because they may be concerned with it with respect to productivity since there has been testimony both ways with respect to it from the experts in the case." This request was not granted. (Tr. 762, 765-766.)

The court, with the acquiescence of the prosecutor and defense counsel (Tr. 666-667), furnished the jury with individual written "Forms of Verdict" on which were printed the various alternative verdicts that could be returned, with spaces in which each juror could indicate his respective choice.

F. Verdict

The forelady announced that defendant had been found guilty on all three counts and that the jury had been unable to agree on the punishment for murder in the first degree. At the request of defense counsel, the Form of Verdict papers were then collected from the jurors by the Marshal. When defense counsel asked that the jury be polled, the court ordered the written forms returned to the individual jurors, stating: "I specifically gave them these verdicts so that they might refer to them on being polled" (Tr. 771-772). After the Court cautioned the jurors to be sure that each one received back the particular form on which he had previously indicated his vote, the jury was polled (Tr. 772-779).

Upon a subsequent examination of the verdict forms, defense counsel contended that because two alternatives had been checked on one of the forms, there had been no unanimous verdict with respect to the first degree murder count. The trial court disagreed, stating that one of the alternatives "has obviously been erased," and ordered entry of a judgment of first degree murder. (Tr. 780-781.)

STATUTES AND RULE INVOLVED

The pertinent parts of the relevant sections of the D. C. Code (1961 ed.) are as follows:

Title 22, section 2401

Whoever, being of sound memory and discretion, kills another purposely . . . of deliberate and premeditated malice . . . is guilty of murder in the first degree.

Title 24, section 301(d)

If any person tried upon an indictment . . . is acquitted solely on the ground that he was insane at the time of its commission, the court shall order such person to be confined in a hospital for the mentally ill.

Title 24, section 301(e)

Where any person has been confined in a hospital for the mentally ill pursuant to subsection (d) of this section, and the superintendent of such hospital certifies (1) that such person has recovered his sanity, (2) that, in the opinion of the superintendent, such person will not in the reasonable future be dangerous to himself or others, and (3) in the opinion of the superintendent, the person is entitled to his unconditional release from the hospital, and such certificate is filed with the clerk of the court in which the person was tried, and a copy thereof served on the United States Attorney or the Corporation Counsel of the District of Columbia, whichever office prosecuted the accused, such certificate shall be sufficient to authorize the court to order the unconditional release of the person so confined from further hospitalization at the expiration of fifteen days from the time said certificate was filed and served as above; but the court in its discretion may, or upon objection of the United States or the District of Columbia shall, after due notice, hold a hearing at which evidence as to the mental condition of the person so confined may be submitted, including the testimony of one or more psychiatrists from said hospital. The court shall weigh the evidence and, if the court finds that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others, the court shall order

such person unconditionally released from further confinement in said hospital. If the court does not so find, the court shall order such person returned to said hospital.

The pertinent parts of the Federal Rules of Criminal Procedure, United States Code, Title 18, are as follows:

Rule 31(d)

(d) Poll of Jury. When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

Rule 52(b)

(b) Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF POINTS

1. Reversible error was committed by the trial court in permitting the prosecutor, without any prompt curative action by the court, to argue to the jury that the result of a verdict of not guilty by reason of insanity might be only a short confinement in a mental hospital, and to insinuate that such would be the practical effect of such a verdict by stressing that the two medical officials at St. Elizabeths Hospital who would determine appellant's qualifications for release had already formed the opinion that he was sane.
2. The evidence that appellant suffered from a mental illness and that the offenses charged were a product of that illness was so strong that a reasonable mind must necessarily have entertained reasonable doubt as to appellant's criminal responsibility for those offenses, and hence a judgment of acquittal by reason of insanity should have been directed.
3. Reversible error was committed by (a) the trial court's instruction to the jury that the presumption of sanity remained in this case as evidence and was to be considered by the jury with all other evidence on the issue of insanity, and by (b) the trial court's confusing instructions with respect to the burden of proof on the insanity issue.

4. Appellant's right to a poll of the jury was violated by the trial court's instruction that printed forms on which each juror had indicated the verdicts which he had reached in the juryroom should be returned to him for his use on being polled, without indicating in any way that he was not being asked to confirm orally his previous written verdict but could repudiate it if at the time of polling he desired to render a different verdict.

SUMMARY OF ARGUMENT

I.

The prosecutor's closing argument to the jury with respect to the effect of a verdict of not guilty by reason of insanity constituted reversible error. The remarks in substance stated that the two hospital officials who would be most concerned with determining appellant's eligibility for release from custody, if such a verdict were returned, had already testified that appellant was free of mental illness. The obvious purpose of the prosecutor's remarks was to impress upon the jurors that if they returned a verdict of not guilty by reason of insanity, appellant would be released from medical supervision within a very short time. Not only were these comments irrelevant to the task of the jury, but they were grossly inaccurate for many reasons - including the error in equating the standard for determining eligibility for release after a verdict and the standard for determining criminal responsibility for the offenses.

The simple one-sentence Lyles instruction, given by the trial court to the jury on the day after the prosecutor made his closing argument and without any attempt to correct the prosecutor's erroneous remarks or even to relate the

Lyles instruction in any way to the prosecutor's statements, was wholly inadequate to eradicate the error. In the absence of prompt, curative action by the trial court, the conclusion is inescapable that one or more members of the jury might have been influenced by the prosecutor's remarks not to vote for acquittal on the ground of insanity despite a reasonable doubt of appellant's sanity for fear that such a verdict would result in his release forthwith from custody, to commit another homicide or perhaps to commit suicide.

II.

The conviction should be reversed because the quality of the expert testimony in this case, by three disinterested psychiatrists and a psychologist who had examined appellant at St. Elizabeths in the course of their official duties, plus the lay testimony describing the transformation in his conduct and personality after the suicide of his first wife, and the psychiatric report of his stay at D. C. General Hospital after his own attempted suicide, must necessarily create at least a reasonable doubt as to his sanity. This doubt, we submit, persists upon a reading of the record despite the testimony of the prosecution's rebuttal witnesses. Their testimony, in contrast to that of the government doctors who testified for the defense, particularly Drs. Hamman and Stammeyer, reflects a superficial appraisal of appellant's condition without any adequate examination or inquiry on their part. If, as we submit, any reasonable mind would have a reasonable doubt of appellant's sanity and of causality with respect to the offenses charged, a judgment of not guilty by reason of insanity should have been directed.

The prosecutor's tactics in deriding the psychological testimony without any foundation for his disparaging remarks, his misstatements of the evidence, and his initiation of testimony on the "right and wrong" test may have misled the jury. Moreover, having instructed the jury on the "right-wrong" aspect of criminal

responsibility, it was error for the trial court to deny the request of defense counsel to amplify the instruction to cover irresistible impulse.

Finally, this appeal presents the opportunity for adoption by this Court of the "diminished responsibility doctrine" on which an instruction was unsuccessfully sought below.

III.

The trial court erred in instructing the jury that the presumption of sanity was evidence to be considered by the jury in determining appellant's criminal responsibility for the offenses charged. The presumption had served its purpose when it fixed the risk of non-production of evidence of insanity upon the accused. This Court, in line with the prevailing rule in other jurisdictions and the positions taken by leading authorities in the field of evidence, has recognized that the initial presumption of sanity is dislodged and dissipated when evidence on the subject is adduced. In this case, since there was substantial evidence of appellant's insanity, the government had the burden of proving by competent evidence beyond a reasonable doubt that he possessed the mental capacity to commit the crimes charged. To instruct the jury that the presumption remained in the case and was to be treated as evidence was to dilute the burden of proof which rested on the prosecution. The instruction was, therefore, highly prejudicial to appellant.

In view of the ambiguity and confusion of other parts of the trial court's instructions dealing with the burden of proof, it is likely that some of the jurors understood, erroneously, that it was incumbent upon the accused to establish to the jury's satisfaction that the offenses were the product of his mental illness. As this Court stated in Blocker, 110 U.S. App. D.C. 41, and Isaac, 109 U.S. App. D.C. 34, a conviction cannot be allowed to stand when the charge on burden of proof contains these ambiguities.

IV.

Appellant's right to a poll of the jury was subverted by the procedure followed below. As this Court has stated, there is no question but that a juror has the right, when polled, to dissent from a verdict to which he has agreed in the juryroom. This principle was ignored by the trial court when it directed that the written forms on which the jurors had indicated their votes in the juryroom should be returned to them "so they might refer to them on being polled." The jurors were not advised in any way that the purpose of the polling was to ascertain their individual verdicts as of the time of polling, and that they were not bound by the previous verdict but could change it if they were so inclined. Instead, the court's admonition to the jurors, when the verdict forms were returned to them, to "be sure to get your own" implied that it was important that they adhere to the verdict previously indicated by them. The misleading effect of the procedure used below is apparent from the answers of the jurors to the questions of the Clerk. Their responses for the most part merely parroted the language which appeared on the written form.

In view of the doubt that the jurors understood that they were being afforded by the polling process a fresh opportunity to state their individual verdicts as of the time of polling and not merely an opportunity to confirm orally that the notations made on the written form correctly represented their vote in the juryroom, there is no certainty that a unanimous verdict was in fact reached in this case.

ARGUMENT

I. The Prosecutor's Warning to the Jury that a Verdict of Not Guilty by Reason of Insanity Would in Effect Result in Appellant's Release From a Mental Hospital Within a Short Time was Highly Prejudicial.

(With respect to Point I, appellant desires the Court to read the following pages of the reporter's transcript: Tr. 705-706, 717-718, 753).

Although the prosecutor obtained a ruling permitting him to argue to the jury - as an offset to remarks of defense counsel - that, in the event of a verdict of not guilty by reason of insanity, appellant's confinement in a mental institution "may not necessarily be a long, long time" (Tr. 706), he did not limit his comments to this point. The temptation to exploit the opportunity was apparently overwhelming and he proceeded to urge the jury to take into account in "thinking about" the probable duration of appellant's confinement the fact that the medical officials in "overall control at the hospital, at the maximum security division," namely, as he previously stated, Dr. Owens, who "runs the show over there" and Dr. Platkin, his "next in command," had already expressed the opinion that appellant is without mental illness. (Tr. 717-718). The obvious purpose of this comment by the prosecutor was to engender in the minds of the jurors the fear that, since the hospital authorities directly concerned with determining appellant's qualifications for release had already found him free of mental illness, he would be released forthwith if a verdict of not guilty by reason of insanity were returned.

We submit that the trial court should not have permitted the prosecutor to discuss the effect of the verdict at all, even though it was advised by the prosecutor that he would limit himself to a comment in retaliation against a statement by the defense counsel. 11/ The court properly should have denied the prosecutor's request

11/ Dugan Drug Stores, Inc. v. United States, 326 F.2d 835, 837 (5th Cir. 1964); United States v. Curtiss, 330 F.2d 278 (2d Cir. 1964).

and told the jury that in due course the applicable instruction on the point would be given by the court itself. As the Supreme Court has said, the trial judge "is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct . . ." 12/ He cannot discharge his duty to see that the law is properly administered by remaining inert. 13/ This Court has pointed out that "the better practice is for the trial judge, rather than for [defense] counsel, to give the explanation [of the consequences of an insanity verdict] to the jury." 14/ A fortiori the prosecutor should not have been allowed to explain the effect of such a verdict.

At the very least, when the prosecutor proceeded beyond the scope of the ruling and attempted to implant in the jury's mind the thought that confinement after an acquittal for insanity would be of short duration, the court should have stopped him immediately and admonished the jury to disregard his remarks. Its failure to do this substantially deprived the appellant of his rights to a fair and meaningful consideration by the jury of his defense of insanity. If the jury believed that appellant would be immediately turned loose, it might well have decided - as it did - to convict him in order to assure his long confinement, notwithstanding a reasonable doubt as to his sanity. 15/

12/ Quercia v. United States, 289 U.S. 466, 469 (1933); Glasser v. United States, 315 U.S. 60, 82 (1942).

13/ Billeci v. United States, 87 U.S. App. D.C. 274, 282, 184 F.2d 394, 402 (1950); United States v. Marzano, 149 F.2d 923, 925 (2d Cir. 1945).

14/ Catlin v. United States, 102 U.S. App. D.C. 127, 128, 251 F.2d 368, 369 (1957).

15/ Durham v. United States, 99 U.S. App. D.C. 132, 134, 237 F.2d 760, 762 (1956). State v. Johnson, 267 S.W. 2d 642 (Mo. 1954) and other decisions of state courts on the point are collected in 44 A.L.R. 2d 978 (1955), 2 A.L.R. 2d Supp. 2984-85 (1960), and 3 A.L.R. 2d Supp. 969 (1962). It will be noted that in the few decisions holding that such statements do not constitute prejudicial error, the evidence that the defendant was not insane was overwhelming or the error was cured by prompt, accurate and explicit instructions to the jury. Neither circumstance is present in the instant case.

This Court has repeatedly emphasized that "nothing justifies a judge in warning a jury that, if they acquit the accused, they will be releasing a dangerous man to prey upon society." (Blunt v. United States, 100 U.S. App. D.C. 266, 278, 244 F.2d 355, 367 (1957)). Similarly, nothing justified the prosecutor - with or without the court's consent whether tacit or otherwise - from conveying a similar warning. The jury has "no concern with the factual situation which may or may not develop in any one of many possible combinations of circumstances after their duties have been discharged and they are gone from the case." Lyles v. United States, 103 U.S. App. D.C., 22, 27, 254 F.2d 725, 730 (1957), cert. denied, 356 U.S. 961 (1958).

Since the prosecutor's remarks were not only irrelevant to the task of the jury, but were also grossly misleading, the trial court should not only have admonished the jury that the duration of confinement after verdict was not their legitimate concern, but as a protective measure should have cautioned them carefully and explicitly that any inference that appellant would be released shortly was wholly unwarranted. He should have pointed out to them, in unmistakable language, that the opinions expressed by Drs. Owens and Platkin had no bearing whatsoever on the duration of appellant's confinement in the event of an acquittal by reason of insanity.

There are many reasons for the immateriality of the opinions of these two doctors. In the first place, although the jurors had no reason to know it, presumably the prosecutor and the trial judge knew that appellant might be confined in some mental hospital other than St. Elizabeths, and even if he were sent to St. Elizabeths, Dr. Owens and Platkin might have no role whatsoever in the determination of appellant's qualifications for release. Secondly, the standard for determining eligibility for release is different from that for determining mental responsibility for the offense. Lyles v. United States, supra, at 27, 254 F.2d at 730. Thirdly, opinions with respect to his release would be concerned with his mental condition

some time after the 1964 verdict and hence might well be different from an opinion as to his mental condition at an earlier time. Fourthly, even if appellant were confined to St. Elizabeths, the decision on whether or not to release the patient in such circumstances would be entrusted not solely to the hospital authorities but rather to both the Superintendent of St. Elizabeths and the District Court and "the function of each is a real responsibility." 16/ Thus, even if the Superintendent should certify that appellant had regained his sanity and was no longer dangerous to himself or to others, either the court sua sponte or the United States Attorney can require a judicial hearing in which the United States Attorney would have a full opportunity to contest appellant's qualifications for release. D.C. Code § 24-301(e) (1951); Blunt v. United States, supra, at 278 n.28, 244 F.2d at 367 n. 28. In no event, however, is the role of the court in the release procedure pro forma or merely technical. Isaac v. United States, 109 U.S. App. D.C. 34, 38, 284 F.2d 168, 172 (1960).

Instead of promptly correcting the erroneous impressions of the effect of a verdict of not guilty by reason of insanity which were created by the prosecutor's statement, the trial court allowed them to remain overnight in the minds of the jurors. It was not until the following day that the simple Lyles instruction was given, as a one-sentence comment in the course of an hour-long charge (Tr. 753). Moreover, no attempt whatsoever was made by the trial judge to relate his instruction to the remarks of the prosecutor or to focus the attention of the jurors on the inaccurate implications conveyed on the previous day. While the recitation in haec verba of the Lyles instruction would have been adequate if it had not been preceded by the prosecutor's comments, it was wholly inadequate in the circumstances of this case to eradicate the false impressions left by the prosecutor. It is inescapably

16/ Lyles v. United States, supra, at 27, 254 F.2d at 730.

apparent that at least one or more of the jurors may have paid more attention to the prosecutor's pointed and emphatic comments on the effect of a verdict of acquittal for insanity than to the trial judge's passing reference to the subject.

It cannot be gainsaid that the disposition to be made of an accused in a capital case involving the defense of insanity has a practical and important bearing on a jury's deliberations. One or more members of the jury might well have been influenced not to vote for acquittal on the ground of insanity despite a reasonable doubt of appellant's sanity for fear that such a verdict would result in his release from custody within a short time, possibly to commit another homicide or suicide. The error involved in the prosecutor's statements is so plain and so highly prejudicial as to call for the application of Rule 52(b) of the Federal Rules of Criminal Procedure. This rule, as this Court has said, "is especially appropriate when the mental competency of the accused is in question." Taylor v. United States, 95 U.S. App. D.C. 373, 379, 222 F.2d 398, 404 (1955).

II. The Evidence of Appellant's Mental Disease and Its Relation to the Offenses Charged Against Him Was So Strong That a Judgment of Acquittal on the Ground of Insanity Should Have Been Directed.

(With respect to Point II, appellant desires the Court to read the following pages of the reporter's transcript: Tr. 188-191, 227-228, 241-244, 267, 286, 320-323, 330-333, 339-340, 346-348, 350-355, 358, 365, 369, 372-377, 381-382, 387, 394, 403-406-C, 406-F, 413-423, 453-454, 460-466, 471, 496, 520-521, 523-525, 535, 539, 546-552, 560-564, 566, 568, 572-573, 591-596, 602-603, 611-617, 634, 636, 665-666, 685-686.)

This Court has often stated that a criminal conviction must be reversed when it is clear to the reviewing court that after considering all of the evidence a reasonable mind must necessarily have had a reasonable doubt as to whether or not the offenses charged were the product of a diseased mind. E.g., Hopkins v. United

States, 107 U.S. App. D.C. 126, 128 &n.2, 275 F.2 155, 157 &n.2 (1959). 17/ In view of the nature and extent of the opinion testimony of disinterested doctors that appellant was suffering from a severe mental illness, based on their examinations of the accused at St. Elizabeths in the course of their official duties, reasonable doubt of appellant's sanity persists, notwithstanding the perfunctory testimony elicited in rebuttal.

The importance of a thorough examination to confident diagnosis, in a field where even the best grounded judgment is far from certain, has been repeatedly emphasized.

"Psychiatric testimony should be directed toward explaining what the expert has observed about the dynamics of the defendant's mental condition: for example, about his symptoms, characteristics, behavior and history; and toward indicating, if the psychiatrist is in a position to do so, the effect of the observed condition on the development, adaptation and functioning of the defendant's mental or emotional processes and his behavior controls." 18/

The diagnoses of Drs. Hamman and Stammeyer were grounded in thorough examinations. By way of contrast, the rebuttal testimony in the instant case reflected superficial appraisals of appellant's condition and expressions of opinions formed without any real inquiry into whether or not a dynamic psychopathology may have played a motivating, even though not obvious, role in appellant's antisocial behavior. 19/

17/ This principle has also been recognized in the following decisions of this Court: Douglas v. United States, 99 U.S. App. D.C. 232, 239 F.2d 52 (1956); Wright v. United States, 102 U.S. App. D.C. 36, 250 F.2d 4 (1957); Fielding v. United States, 102 U.S. App. D.C. 167, 251 F.2d 878 (1957); Satterwhite v. United States, 105 U.S. App. D.C. 398, 267 F.2d 675 (1959); Isaac v. United States, 109 U.S. App. D.C. 34, 284 F.2d 168 (1960); Frigillana v. United States, 113 U.S. App. D.C. 328, 307 F.2d 665 (1962).

18/ Hawkins v. United States, 114 U.S. App. D.C. 44, 47, 310 F.2d 849, 852 (1962).

19/ In Carey v. United States, 111 U.S. App. D.C. 300, 302, 296 F.2d 422, 424 (1961), the argument was made that the examination at St. Elizabeths added up to a "wisp of casual observations." Although Judge Bastian rejected this argument after reviewing the techniques of the examinations conducted at St. Elizabeths, it should be noted that the representations made in that case as to the procedures in use indicated a more careful and extensive examination of the accused than appears in the record in the instant case.

Dr. Dobbs formed her negative opinion on the basis of only one staff conference during which she reviewed written data, listened to reports, and observed appellant-- all in the course of a single hour. Dr. Platkin's attempt to embellish his contacts with appellant by claiming that he had examined him "rather extensively" before the staff conference was exposed as an exaggeration (Tr. 535). Dr. Platkin admitted he was referring solely to a 3/4-hour meeting with appellant for the purpose of gauging the latter's understanding of the significance of a legal document concerning the custody of his children. (Tr. 548-549.) Dr. Owens' contacts with appellant were as limited as those of Dr. Platkin and his testimony is likewise open to serious question for, as he himself acknowledged in another case, "if you haven't done an adequate or complete examination, then you should not render an opinion as to the presence or absence of mental illness." 20/

In essence, the testimony of the experts for the prosecution tended to be conclusions as to whether appellant's condition met the test of criminal responsibility. 21/ The prosecutor's closing argument depended mainly on the fact that the opinions of his experts came from the "superior doctors at the hospital" (Tr. 717). While this may have served to surround the opinions with an aura of officialdom, it did little to expose or elucidate for the jury the underlying factors which led to these opinions.

Unlike the situation which may exist in other cases, the conflict in the medical testimony in this case cannot be minimized as being a battle of experts hired and paid for by the two sides. None of the doctors for the defense were retained by the defense. Moreover, notwithstanding appellant's indigence and consequent dependence upon government doctors; notwithstanding the fact that the first staff

20/ Jackson v. United States, No. 18,225, decided by this Court, August 7, 1964, slip opinion, p. 9.

21/ Cf. Carter v. United States, 102 U.S. App. D.C. 227, 252 F.2d 608 (1957); Briscoe v. United States, 101 U.S. App. D.C. 318, 248 F.2d 640 (1957).

conference on his mental capacity was not held until more than five months after the commission of the offenses, thus increasing the difficulties of finding causality; and notwithstanding the unavailability to him of the range of psychoanalytic and other investigative tools which a defendant of adequate means presumably would command for the purposes of examination, preparation and exposition of the insanity defense, 22/ appellant nevertheless was able to have his defense of insanity supported by four of the seven government-paid experts who attempted to evaluate his case, and particularly by Drs. Hamman and Stammeyer, the only experts who had made thorough psychiatric and psychological studies of the appellant. The quality of the expert testimony on his side, plus the evidence from lay witnesses delineating the transformations in his mental condition after the death of his first wife, and the psychiatric report of his stay at D. C. General Hospital, were certainly sufficient to create in a reasonable mind a reasonable doubt of his sanity. That being so, it was incumbent upon the trial court to have ordered a judgment of not guilty by reason of insanity. 23/

Under Point I we have demonstrated that the jury's verdict may be attributable in substantial measure to the prejudicial comments of the prosecutor on the probable short confinement of the accused in the event of an insanity acquittal. To some extent the verdict may also reflect the success of the prosecutor's efforts to deride and disparage the psychological tests which were administered to appellant.

The evidence was uncontradicted - indeed the prosecutor's own witnesses testified - that the tests were recognized, standard tests which were properly administered and which could be interpreted only by qualified experts; that Dr. Stammeyer

22/ Rollerson v. United States, No. 17,675, decided by this Court, October 1, 1964, points out the difficulties facing the accused and the courts when the issue of criminal responsibility is raised by a defendant possessing inadequate resources.

23/ Lynch v. Overholser, 369 U.S. 705, 713 (1962).

was a trained, qualified expert; and that his findings as to the appellant's personality based upon the psychological tests were accurate. ^{24/} Nevertheless, the prosecutor undertook to deprecate the ink blots, projected drawings, etc., by remarks such as "Maybe I'm crazy, Doctor" (Tr. 496), ^{25/} or "[W]hat you are saying is he is just not a good artist." (Tr. 520.) If the prosecutor had some reason to challenge the validity of the psychological tests, he had ample resources at his disposal to summon other experts to contradict Dr. Stammeyer's interpretations. We submit that the jury should have been allowed the benefit of evidence by qualified experts, without having that evidence distorted by unfounded expressions of doubt.

The prosecutor's tactics of disparagement also took the form of misstating the evidence. For example, in attempting to downgrade the expert testimony, the prosecutor stated, erroneously, that "the only thing that anybody says is wrong with him is a personality problem, which the hospital [St. Elizabeths] did not even recognize as a mental illness . . . up until 1957." (Tr. 686.) The facts are that all the witnesses for the defendant spoke in terms of personality disorder, not merely a problem. Moreover, while a sociopathic personality or "emotionally unstable personality" was not classified as a mental disorder at St. Elizabeths until 1957, ^{26/} no witness for either side testified that the type of mental disorder which Drs. Hamman, Dabney, Agler and Stammeyer attributed to appellant was unrecognized until 1957. Indeed, Dr. Dabney testified that this type of disorder was recognized as a mental illness at St. Elizabeths before 1953. (Tr. 332-333.) Another misstatement by the prosecutor was contained in his contention to the jury that "all the government doctors at the second conference said

^{24/} See, e.g., Tr. 564-568.

^{25/} Although the court below stated that the defense counsel's objection to these remarks of the prosecutor was "well taken," it allowed the prosecutor to proceed without any corrective action. (Tr. 496).

^{26/} See Campbell v. United States, 113 U.S. App. D.C. 260, 271, n. 9, 307 F.2d 597, 608, n. 9 (1962) (dissenting opinion); Tr. 387.

that the defendant was obviously malingering." (Tr.685.) If this statement was intended to imply that anyone other than Drs. Platkin and Owens had that impression, it was misleading. (See n. 9, supra.) We are constrained to suggest that the prosecutor's arguments went beyond legitimate advocacy and that the detrimental impact of his remarks upon the jury was strengthened by his official position. 27/

The prosecutor's initiation of testimony on the "right and wrong" aspect of criminal responsibility was also questionable. In McDonald v. United States, 28/ this Court stated that, upon a proper evidential foundation, a jury may be instructed that capacity or lack thereof to distinguish right from wrong - while not an independently controlling or alternative test of criminal responsibility - may be taken into account in determining whether the act charged was a product of mental disease or defect. The spirit, if not the letter, of the limited role assigned to the right and wrong aspect is violated when, as in the instant case, the testimony on the defendant's capacity to distinguish right from wrong is elicited in the first place, not by his counsel, but by the prosecutor. By inquiry into the "right-wrong" aspect, the prosecutor succeeded in bringing into the case a consideration which, under the circumstances, was irrelevant and served only to distract the jury from applying the proper test of criminal responsibility in this Circuit. If, however, it was not improper under these circumstances for the court to allow these questions by the prosecutor and to later instruct as to right and wrong, we submit that it was error to have denied the request of defense counsel to amplify the instruction to cover irresistible impulse. There was no

27/ Cf. Stewart v. United States, 101 U.S. App. D.C. 51, 247 F.2d 42 (1957).

28/ 114 U.S. App. D.C. 120, 124-125, 312 F.2d 847, 851-852 (1962).

less testimony in this case that appellant was irresistibly impelled than there was that he was capable or incapable of distinguishing right from wrong. (Tr. 352-356, 404-405, 524-525.) Thus, if a proper evidential foundation existed for the court's reference to the "right-wrong" aspect of criminal responsibility, there was also foundation to instruct the jury that it might consider whether or not appellant was irresistibly impelled to commit the offenses charged. For the court to have instructed the jury as to one without the other was, we submit, prejudicial error. Cf. Misenheimer v. United States, 106 U.S. App. D.C. 220, 271 F.2d 486 (1959), cert. denied, 361 U.S. 971 (1960).

The trial court denied defense counsel's request to instruct the jury that, even though it did not acquit the defendant because of his mental capacity, it might take that factor into account under the "diminished responsibility" rule and thus convict him of some crime less than murder in the first degree.

"Under this doctrine, the mitigation of punishment . . . rests on the theory that the defendant's ability to resist the impulse to commit the criminal act was seriously impaired by his mental condition. Consequently, his responsibility for the act is 'diminished' and his punishment reduced proportionately." 29/

Although, concededly, the trial court's ruling was in accord with decisions of this Court, 30/ we submit that the time has come for reconsideration and for the adoption of the diminished responsibility concept. We urge the Court, therefore, to hold that in the trial of murder cases the jury should be told that, although it does not find that defendant suffered a mental disorder sufficient to acquit by

29/ American Bar Foundation, The Mentally Disabled and the Law, 357 (1961).

30/ Stewart v. United States, 94 U.S. App. D.C. 293, 296-297, 214 F.2d 879, 882-883 (1954); Stewart v. United States, 107 U.S. App. D.C. 159, 275 F.2d 617 (1960), reversed on other grounds, 366 U.S. 1 (1961); Moore v. United States, 107 U.S. App. D.C. 332, 277 F.2d 684 (1960). See also, Turberville v. United States, 112 U.S. App. D.C. 400, 410, 303 F.2d 411, 421 (concurring opinion), cert. denied, 370 U.S. 946 (1962).

reason of insanity, it may take his mental condition into account in determining whether he is fully responsible for his acts.

Since the concept of diminished responsibility has already been discussed extensively in briefs filed in other cases in this Court (especially in the amicus brief in the first Stewart case, 94 U.S. App. D.C. 293, 296-297, 214 F.2d 879, 882-883 (1954) which set forth in great detail the manner in which the problem has been dealt with in other jurisdictions, both in this country and abroad), we believe that it suffices in the case at bar to call the Court's attention to the fact that the request for an instruction on diminished responsibility was made and overruled below and, therefore, this appeal presents the opportunity for adoption of the diminished responsibility rule in this jurisdiction.

III. The Trial Court's Statement that the Presumption of Sanity Remained in the Case and Was to be Considered by the Jury With all Other Evidence Plus Other Equivocal Instructions on the Burden of Proof Constituted Prejudicial Error.

(With respect to Point III, appellant desires the Court to read the following pages of the reporter's transcript: Tr. 740-745, 748-753, 760-762, 765, 769-770.)

A. The Court Erroneously Instructed the Jury to Consider the Presumption of Sanity

The trial court charged the jury:

"In determining the insanity issue, you must weigh all of the evidence, including the presumption of sanity which remains in the case and is to be considered by you along with all other evidence on the issue of sanity." (Tr. 748-749.)

This instruction is in conflict with decisions of this Court which recognize that when there is some evidence of mental disorder, the presumption of sanity vanishes from the case and the responsibility for proving sanity from that point on is on the government. Blocker v. United States, supra; Tatum v. United States,

88 U.S. App. D.C. 386, 389, 190 F.2d 612, 615 (1951). 31/ These latter decisions are in line with decisions of other Circuits and the prevailing rule in most jurisdictions. For example, in Hall v. United States, 295 F.2d 26, 30 (4th Cir. 1961), Judge Sobeloff concluded that the "initial presumption of sanity was dislodged by the testimony, thus creating an issue for the jury." In Fitts v. United States, 284 F.2d 108, 112 (10th Cir. 1960), the court stated:

"The presumption of sanity is a rule of law which stands in the place of evidence, in the absence of evidence to the contrary. When, however, evidence of insanity is produced, from whatever source, the presumption of sanity disappears, and the mental capacity of the accused to commit the crime becomes an essential element to be proven by competent evidence beyond a reasonable doubt.

* * *

"We think the question of the sufficiency of the evidence to dissipate the presumption of sanity and raise the issue of insanity is one of law for the court to decide in the first instance." [Emphasis added.] 32/

In United States v. Fielding, 148 F. Supp. 46, 52 (D. D.C. 1957), Judge Holtzoff stated that:

"[I]f evidence of insanity is introduced by the defendant, the presumption [of sanity] vanishes and the Government is then charged with the duty of going forward with the evidence and proving mental competency in order to sustain the general burden resting upon it"

Although the District Court decision was reversed on its holding that the trial court lacked authority to direct a judgment of acquittal by reason of insanity, there is no disagreement in this Court's opinion in Fielding with the statement that the presumption of sanity vanished with the introduction of evidence of insanity. 33/

31/ The proposed model charge which Judge Burger set forth in his appendix to Campbell v. United States, 113 U.S. App. D.C. 260, 279, 307 F.2d 597, 616 (1962), includes an instruction that the sanity presumption "no longer prevails" after evidence on insanity is introduced.

32/ The Fitts decision again was approved and followed in Phillips v. United States, 311 F.2d 204 (10th Cir. 1962).

33/ Fielding v. United States, 102 U.S. App. D.C. 167, 251 F.2d 878 (1957).

The proper role of the presumption of sanity has been set forth by Professor Wigmore.

"[Its effect] is merely to invoke a rule of law compelling the jury to reach the conclusion in the absence of evidence to the contrary from the opponent. If the opponent does offer evidence to the contrary (sufficient to satisfy the judge's requirement of some evidence), the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule.

* * *

"The accused's sanity is, by the orthodox view, a part of the case of the prosecution; and the burden of proving it, in the sense of the risk of non-persuasion . . . is on the prosecution; the measure of persuasion required being, as in other elements of a crime, persuasion beyond a reasonable doubt . . .; and, as an incident of this view, the general presumption of sanity suffices for the prosecution's duty to produce evidence, and only the duty of producing evidence of insanity is thrown upon the accused." 34/

The instruction below that the presumption of sanity is to be considered along with "all other evidence on the issue of sanity" compounds the aforementioned error.

"A majority of the courts have held that presumptions are not evidence.*** The prevailing view, sometimes called the Thayerian Rule, has been that when opposing evidence comes into the case, the presumption, having served its purpose, is no longer operative and the issue is determined on the evidence just as though no presumption had ever existed.

* * *

"The effect of this rule is to use the presumption as a means of casting the burden on the opponent to produce evidence to overcome the presumption, and when he has done so by producing enough evidence to warrant the jury in finding against the presumption, it then becomes a matter of inferences from logic rather than from the application of a rule of law." 35/

Thus, contrary to the instruction below, the presumption of sanity served its only purpose when it fixed the risk of non-production of evidence of insanity upon the accused. It ceased to have any effect whatsoever as soon as evidence was introduced from which the jury could reasonably have found the non-existence of the presumed fact. Since there was clearly sufficient evidence in this case for that

34/ 9 Wigmore, Evidence, 289, 359-360. (3d ed. 1940). [Emphasis omitted.]

35/ 1 Jones, Evidence, 201, 204-205 (5th ed. 1958).

purpose, the court should not have told the jury anything about any presumption of sanity. It was, we submit, prejudicial error to dilute the burden of proof which rested on the government by giving an instruction that had the effect of placing upon appellant the burden of overcoming a presumption by establishing that he lacked the requisite mental capacity to be held responsible for his acts.

B. Other Instructions on Burden of Proof Were Prejudicially Confusing

The trial court correctly stated at various points in the charge to the jury that the government had the burden of proving beyond a reasonable doubt that the accused was either not suffering from a mental disease or a mental defect when the offenses charged were committed or, if he was, that the offenses were not a product of such condition. 36/ Other portions of the charge, however, were ambiguous and may have indicated to some of the jurors that in order to find defendant not guilty by reason of insanity it must be affirmatively determined that the acts were produced by mental illness. Thus, the court stated:

"In order for a person to be relieved of the responsibility for crime by reason of insanity there are two requirements: First, he must have suffered from a mental disease or mental defect at the time of the offense; and second, his act must have been the product of that mental disease or mental defect." (Tr. 742) [Emphasis added.]

The court employed virtually the same language in responding to the jury's request for amplification of the instructions on one of the aspects of the insanity issue. (Tr. 765.)

The main charge also referred to the requirement of causality as becoming operative "if you find that such mental disease or mental defect was suffered by the Defendant," and that:

"The phrase 'product of' . . . means that the facts concerning the mental disease or mental defect or the facts concerning the acts are such as to justify reasonably the conclusion that but for the mental disease or mental defect the acts would not have been committed.

"The issue of fact which you are called upon to decide with respect to the defense of insanity is whether the accused was suffering from a mental disease or a mental defect . . . and if you find that he was so suffering, whether there was a relationship between such disease or defect and the alleged criminal act, and if so, whether that relationship was such as to justify a reasonable inference that the accused would not have committed the act if he had not had the mental disease or mental defect." (Tr. 743-744.) [Emphasis added.]

The jury's interruption of its deliberations to request further instructions both on an aspect of the insanity defense and on the definition of reasonable doubt obviously indicates that difficulty on these crucial points was being experienced by at least one or more jurors. The judge's responses fell short of completely resolving these difficulties. The supplementary comment on the insanity defense was not accompanied - as we believe it should have been - by a careful admonition that the burden of proving the mental capacity of the accused beyond a reasonable doubt, no less than the burden of establishing every other factual element of the crimes, remained on the government. Instead, the jury was advised in part that:

"If it is your determination that the defendant was suffering from a mental illness, then the question of productivity arises. If you have determined that serious personality problem is not a mental illness, then the issue of productivity does not arise." (Tr. 765.) [Emphasis added.]

It was not until a later, disjointed point in the supplementary instruction, after the court had again discussed the difference between the degrees of murder, that a simplified version of the court's earlier definition of reasonable doubt was given - significantly without specific reference to the insanity issue. (Tr. 769-770.)

We should not be called upon to speculate that every juror understood that the burden of proving beyond a reasonable doubt that appellant was not mentally ill or that his acts were not the product of his diseased mind was upon the prosecution. It is not unlikely that, since the charge was not crystal-clear, at least one juror understood that it was incumbent upon the accused to demonstrate to the jury's satisfaction that he was suffering from a mental illness and that his acts were

the product of that illness. Since portions of the charge to the jury were confusing, the conviction should not be allowed to stand. Blocker v. United States, 110 U.S. App. D. C. 41, 288 F.2d 853 (1961); Isaac v. United States, supra.

The trial court also erred in its definition of "reasonable doubt." It stated:

"If after a fair comparison of all the evidence you are not satisfied of the guilt of the Defendant, then you have a reasonable doubt and should find him not guilty. On the other hand, if after a fair comparison of all the evidence you have an abiding conviction of the guilt of the Defendant, such a conviction as you would be willing to rely upon in determining the more weighty and important affairs of your own everyday lives, then you do not have a reasonable doubt and may find him guilty." (Tr. 769-770).

As this Court recently noted in Jones v. United States, No. 18,410, D. C. Cir., October 15, 1964, p. 5, the Supreme Court has stated:

" 'We think this section of the charge should have been in terms of the kind of doubt that would make a person hesitate to act, see Bishop v. United States, 71 App. D.C. 132, 137-138, 107 F.2d 297, 303, rather than the kind on which he would be willing to act.' Holland v. United States, 348 U.S. 121, 140 (1954). (Emphasis added.)"

IV. The Trial Court Subverted the Purpose of the Poll of the Jury by Referring the Jurors to their Previous Written Verdicts Without Advising Them That They Were Free, on Being Polled, to Repudiate Those Verdicts.

(With respect to Point IV, the appellant desires the Court to read the following pages of the reporter's transcript: Tr. 753-754, 772-778, 780-781.)

As this Court has stated: "There can be no question of the right of a juror, when polled, to dissent from a verdict to which he has agreed in the jury room" 37/ The effect of polling the jury is "to eliminate the previously proffered verdict and substitute . . . the individual verdict of each juror." 38/

37/ Bruce v. Chestnut Farms-Chevy Chase Dairy, 75 App. D.C. 192, 193, 126 F.2d 224, 225 (1942).

38/ Solar v. United States, 86 A.2d 538, 540 (D.C. Mun. Ct. App. 1952).

Thus, the fact that a juror voted for the verdict announced by the forelady in this case did not preclude him from repudiating that verdict upon the poll of the jury. ^{39/} One of the main purposes of the defendant's right, recognized by Rule 31 (d) of the Federal Rules of Criminal Procedure, to a polling of the jury after a verdict is returned and before it is recorded is to enable each member of the jury to avail himself of the opportunity to change a verdict about which, on further reflection, he has doubt.

It was error for the trial court to order the written verdicts returned to the jurors for their reference upon polling. If a juror cannot remember his decision on the guilt or innocence of a defendant accused of a capital offense without having his memory refreshed by referring to a written form, the value of the polling process is indeed questionable. Certainly it was error of the most egregious kind for the trial court to have returned the written forms without advising the jurors explicitly that each one had the right as of the time of the polling either to assent or not assent to the verdict previously indicated by that juror on the form. Instead, by ordering the return of the written forms of verdict to the jurors "so they might refer to them on being polled" and advising each juror to "be sure you get your own [paper]" (Tr. 772), the court stressed the importance of adhering to the verdict previously reached. At no point did the court attempt to offset this manifest impression by indicating that the jurors were free to change their previous verdict. It is likely, we submit, that at least one or more of the jurors thought that the purpose of the polling was merely to obtain a reiteration orally of the results contained on their written forms. Misapprehension as to the purpose of the polling is illustrated by the following passage (Tr. 774-775.):

^{39/} 5 Wharton, Criminal Law and Procedure, 333 (1957).

"The Clerk: Mrs. Elsie B. Yauchler, how do you find as to the Defendant on Count 1?

Mrs. Yauchler: Guilty of murder in the first degree.

The Court: Is that your total verdict?

Mrs. Yauchler: Do you mean -- I went along with 3.

The Court: What does that say?

Mrs. Yauchler: That says, guilty of murder in the first degree but unable to agree by unanimous vote as to punishment.

The Court: Very well.

The Clerk: How do you find as to the Defendant on Count 2?

Mrs. Yauchler: Guilty of murder on Count 2.

The Court: No, no. Count 2.

Mrs. Yauchler: Oh, I am sorry. Guilty.

The Clerk: How do you find as to the Defendant on Count 3?

Mrs. Yauchler: Guilty."

It is also not without significance that, not only was Juror Yauchler merely parroting the language of the written form, but the responses of Jurors Duggan (Tr. 772-773), Gibbs (Tr. 775), Humphrey (Tr. 775-776), Wilson (Tr. 776), Jackson (Tr. 777) and Burnett (Tr. 778) were likewise in precisely the language as it appeared on the written form, to wit: "Guilty of murder in the first degree but unable to agree by unanimous vote as to punishment." (The only exception was the oral insertion by several jurors of the word "the" before punishment.) This is more than mere coincidence - it underscores the doubt that the jurors understood that they were being afforded a fresh opportunity to state their verdict as of the time of the polling and not merely an opportunity to confirm orally that the notation made on the written form correctly represented their vote in the jury room.

Since the record does not give any basis for assurance that the individual jurors, as of the time of the polling, still assented to the previous verdict, the right of the defendant to have the jury polled, as recognized by Rule 31(d), was subverted. As Judge Maris stated in Miranda v. United States, 255 F.2d 9, 17-18, (1st Cir. 1958), this right

"is of ancient origin and of basic importance. The objective is to give each juror an opportunity, before the verdict is recorded, to declare in open court his assent to the verdict which the foreman has returned and thus to enable the court and the parties to ascertain with certainty that a unanimous verdict has in fact been reached and that no juror has been coerced or induced to agree to a verdict to which he has not fully assented.

* * *

"[T]he right to poll the jury is the right to require each juror individually to state publicly his assent to or dissent from the returned verdict which has been announced in open court in his presence."

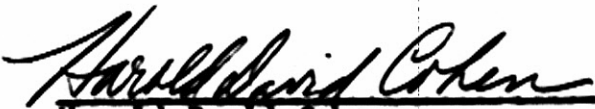
Since the manner in which the written forms of verdict were used in this case precludes any certainty that a unanimous verdict was in fact reached, the judgment of conviction cannot be allowed to stand. 40/

40/ It should be noted that after the jury was excused and defense counsel had an opportunity to examine the written forms of verdict, he called the court's attention to one of the forms as having two of the alternative verdicts on Count One checked. In view of that circumstance, he urged that there was no unanimous verdict with respect to Count One and that no entry of judgment of first degree murder should be entered. The judge disagreed, stating that it appeared to him that one of the alternative verdicts had been erased. He then ordered a judgment of first degree murder to be entered (Tr. 780-781). While it was not referred to by defense counsel below, an examination of the forms of verdict in the file of the Clerk of this Court indicates that in addition to one form on which there may have been an attempted erasure, there is one form in which the juror indicated that he was voting for both #2 (Guilty of Murder in the First Degree and by unanimous vote recommend life imprisonment) and #3 (Guilty of Murder in the First Degree but unable to agree by unanimous vote as to punishment).

CONCLUSION

For the foregoing reasons, appellant respectfully requests that the judgment of conviction in this case be vacated and the case remanded with directions either (1) to enter a judgment of acquittal by reason of insanity or (2) to order a new trial.

Respectfully submitted,


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Appointment of this Court *

November 9, 1964

* Substantial assistance in the preparation of this Brief has been rendered by W. Theodore Pierson, Jr., a recent graduate of George Washington University Law School, who is a candidate for admission to the D. C. Bar.

100 A

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18786

DAVID A. KEYS, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

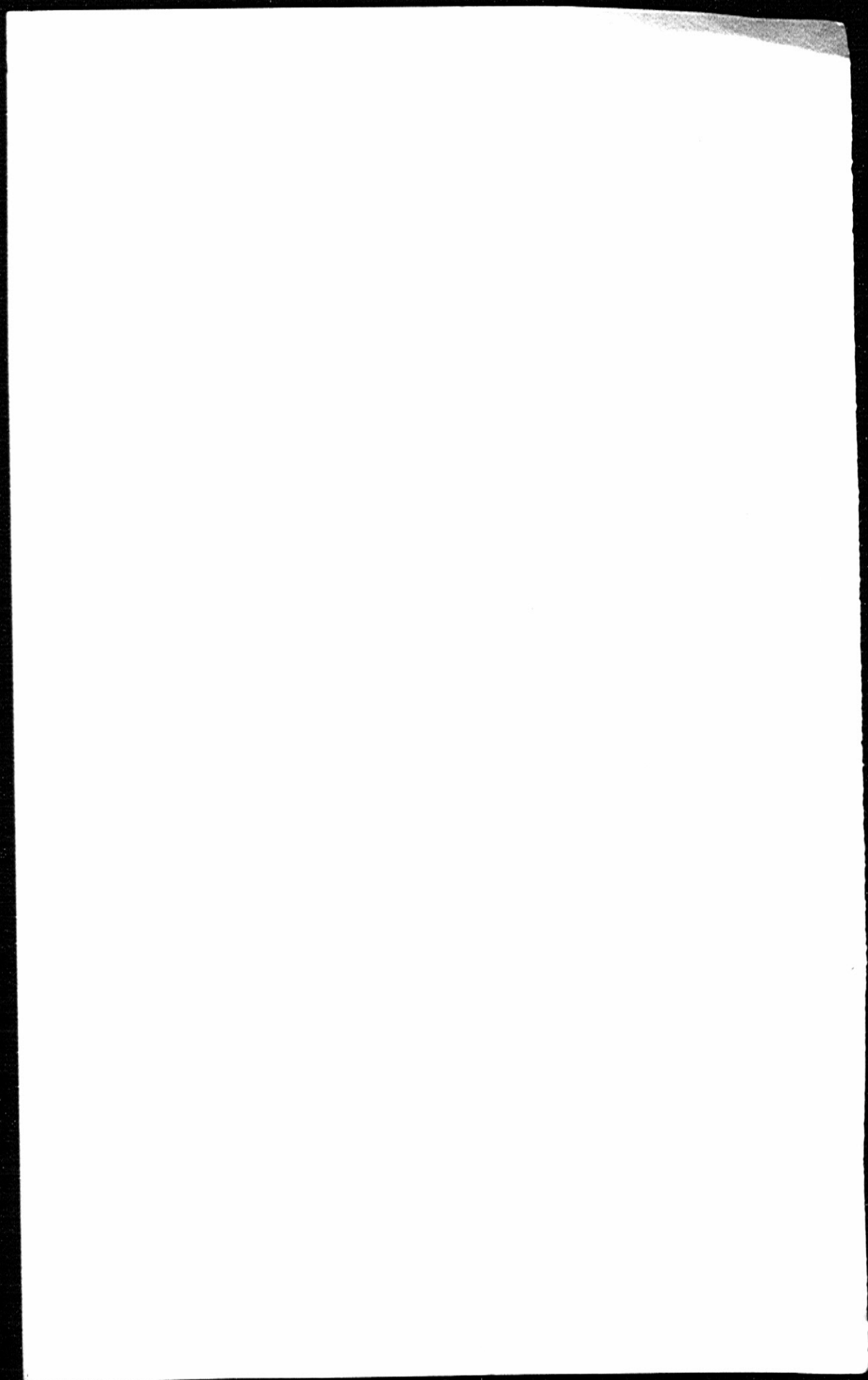
APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 4 1965

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QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented by this appeal:

1. Whether in the circumstances of this case a statement by the prosecutor in his closing argument that if the accused were acquitted by reason of insanity he would not necessarily remain in St. Elizabeth's for a long time, made in response to a defense argument suggesting that he would be confined for "a long, long, long, long time," was improper and reversible error.

2. Whether on all the evidence the trial court should have directed a verdict of acquittal by reason of insanity.

3. Whether the jury instructions on the presumption of sanity, burden of persuasion, and reasonable doubt were erroneous.

4. Whether it was improper to return verdict forms to the jury before the jurors were polled.

□

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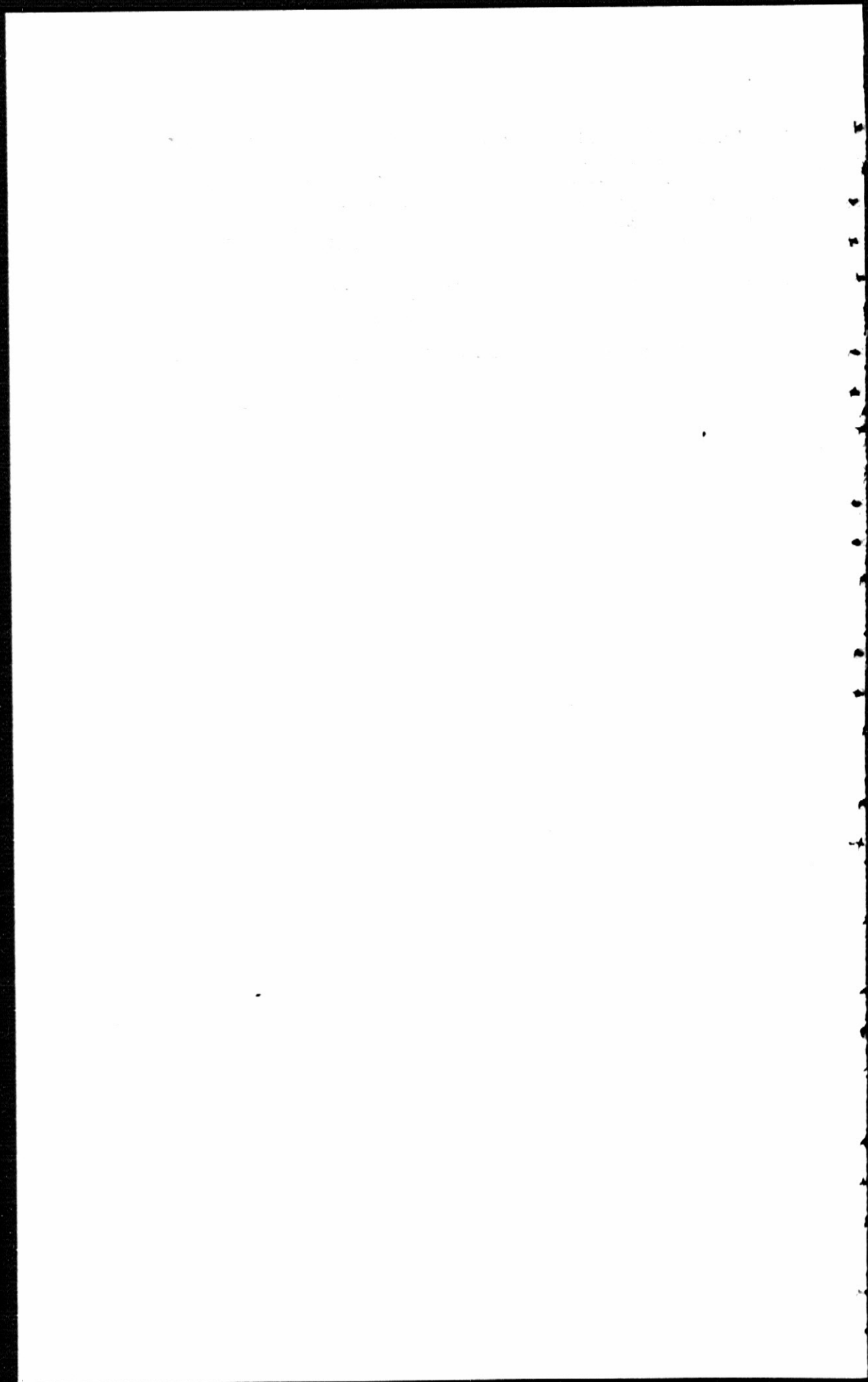
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18786

DAVID A. KEYS, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

***APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA***

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This is an appeal from a sentence of life imprisonment entered upon a verdict of murder in the first degree (the jury being unable to agree on punishment), coupled with two sentences of 40 months to 10 years upon each of two counts of assault with a dangerous weapon, the latter two sentences to run concurrently with each other and with the life sentence. The evidence shows beyond question that on the 7th day of November 1962 appellant David Keys carried a sawed-off shotgun to a restaurant where his wife Pricilla worked, shot and seriously wounded two other women, and then went down into the basement and killed his wife with a shotgun blast in the head.

The principal (in truth, the only) defense below was insanity. It appears to be conceded here (Br. App., at 3) that if on the whole evidence a reasonable jury could conclude that the Government had proved sanity or nonproductivity beyond a reasonable doubt, then the verdict and judgment must stand.

This counterstatement will relate the facts in the record with respect to each of the four questions presented by appellant's brief (not, however, in the same order as he presents them). We first summarize the evidence with respect to the insanity question; next we state the facts about the prosecutor's comments to the jury on the possible duration of confinement in a mental hospital following an acquittal by reason of insanity; then we briefly describe the judge's charge to the jury on the presumption of sanity, burden of proof, and reasonable doubt; and finally, we state the facts concerning the polling of the jury.

1. The evidence on the insanity defense

The Government called as expert witnesses three psychiatrists, Doctors Owens, Platkin, and Dobbs. Doctor Platkin was then the physician in charge of the maximum security division at St. Elizabeths Hospital; Doctor Owens was Clinical Director; and Dr. Dobbs was Assistant Chief of Service (T. 590, 591, 606, 531). All three had more experience and held positions of greater responsibility than the defense psychiatrists (T. 315, 366A, 409-410). Owens, Platkin, and Dobbs each testified that Keys was without mental disease or defect at the time of the offenses charged. (See, *e.g.*, T. 539, 542, 578, 615, 617, 618, 659, 594, 595, 596, 599, 603, 604.)

Doctors Owens, Platkin, and Dobbs each testified that they could not find that Keys had any symptoms of mental illness (T. 539, 542, 659); that they had not observed any unusual behavior or bizarre responses by Keys (except for the second staff conference, which we discuss in Argument II, *infra*) (T. 535, 611, 592-593); and that they did not believe the psychological and other tests to which Keys had been subjected by the clinical psychologist (a defense witness) showed symptoms of mental illness (T. 540, 578-579, 617, 595-599).

On the other hand, the defense called four expert witnesses, three psychiatrists at St. Elizabeths Hospital (Doctors Dabney, Hamman, and Agler), and the Hospital's clinical psychologist (Dr. Stammeyer). Dr. Dabney testified that Keys was suffering from a severe type of personality disorder "called the paranoid personality disorder." (T. 320), which in his

opinion is a mental disease (T. 322), and he believed that if Keys did the acts with which he is charged "they would be a product of this mental disorder." (T. 323.) Dr. Hamman testified that at the time of the offense Keys was suffering from a "severe character neurosis," which he called "a personality pattern disturbance," and a "passive dependent personality" (T. 372-374), and that there was a "definite causal relationship between the acts and the mental illness." (T. 377.) Dr. Agler described Keys as having a "passive-aggressive personality disorder" (T. 413), but he was not sure that the acts charged were a product of the disease (T. 418, 419, 420), although he thought it likely (T. 419).¹ Dr. Stammeyer, the clinical psychologist, thought Keys had a "mental disorder" classified as "passive aggressive personality, passive dependent type," and that the crime was the product of this disorder (T. 471).

There was also lay testimony suggesting both mental disorder and the lack of it. Thus, there was evidence that as a child Keys got along well with his brothers and sisters, like any normal child (T. 196); and that there was nothing "unusual" about him as a youth (T. 247). And Keys completed ten years of school without any academic difficulty (T. 175, 195), leaving voluntarily (T. 195-196) to enter the Army (T. 175) where he attained the rank of Sergeant First Class (T. 199). He served for nine years (T. 299) and was honorably discharged (T. 176-177).

After leaving the Army in 1957 (soon after his first wife died, apparently a suicide) he attended a hair stylist school in New York for more than a year (T. 181, 182), and graduated with honors (T. 182, 202) in 1958. And later, for a long period of time (T. 203-205) he held down a job as a cement finisher in the construction trade (T. 183, 203) right up to the date of the murder (T. 205). There was expert medical testimony that doing well in school, achieving this Army rank and holding down a job was at least suggestive of a lack of mental disease (T. 439, 517).

¹ Thus appellant's claim that *all* the defense experts determined that "the offenses charged against him were produced by his illness" (Br. App. at 9) is not strictly true in the case of Dr. Agler.

A friend of Keys, with whom he stayed from time to time during the period before his second marriage in early 1962 (T. 226) testified on cross examination that he "wouldn't say [Keys] was crazy" (T. 230) and that he was never violent (T. 230). And Mr. Schingler (father of the deceased and appellant's father-in-law) admitted (on cross examination when asked by defense counsel) that on the very morning of the murder, only a few hours before the killing, when Keys came into the restaurant for the first time, he did not appear to be "worried or nervous." (T. 40.)

There was also testimony, most of it from Keys' relatives, which would suggest that Keys was suffering from some sort of mental disorder. Appellant describes this testimony in his brief (pp. 6-8), and we comment upon some of it (and take issue with some of what he says) in Argument II, *infra*.

2. Prosecutor's statements to the jury about possible duration of confinement at St. Elizabeths Hospital upon an acquittal for insanity

In his initial closing argument to the jury the prosecutor did not refer in any manner to the possible duration of appellant's confinement should he be acquitted by reason of insanity (T. 670-688). Appellant's counsel, almost at the end of his argument, told the jury that if they found Keys not guilty by reason of insanity, "it does not mean that he is going to go out of this courthouse free. It means that maybe for a long, long, long, long time, until they find that he is no longer dangerous, that he is going to be kept in an institution provided by law." (T. 704-705.)

Immediately after defense counsel's conclusion of his argument the prosecutor approached the bench and told the judge and counsel that "Mr. Lane has told the jury that the defendant may be sent to St. Elizabeths or an institution for a long, long time, or until such time that they determine he is no longer dangerous to himself." Then he said (T. 706):

I feel that he has opened up the door for me to argue to the jury that it may not necessarily be a long, long time. I don't want to do it without asking your Honor's ruling

first, because I think the jury is under a misapprehension at this point.

Defense counsel then said, "That is a matter of argument." (T. 706). The colloquy then continued (*Ibid*):

The COURT: Do you agree that he make the argument?

Mr. LANE: Sure, he can argue.

The COURT: All right.

The prosecutor then made the statements appearing at the top of page 21 of the appellate's brief. He referred to the positions held at the hospital by the Government's experts as part of his argument that the jury should not acquit for insanity "in the face of their testimony," as the defense was asking them to do.

Only after making that argument did the prosecutor turn to the question of the duration of confinement in St. Elizabeths. He said (T. 717-718):

And one other thing, while we are talking on the subject of the hospital: Mr. Lane has argued to you that a verdict by reason of insanity would send this defendant to St. Elizabeths for a very long time, until he was found no longer to be dangerous to himself or others.

Now, on the contrary, such a verdict would well send him to St. Elizabeths, but not *necessarily* for a long time. If he was found no longer to be dangerous to himself or others, he could be released from that hospital in a short time, not a long time, but a short time.

And when you are thinking about that, think again of the opinion of the Clinical Director and the Chief Staff Psychiatrist at that hospital. These are the two men who have overall control at the hospital, at the maximum security division.

So, ladies, and gentlemen of the jury, a verdict of not guilty by reason of insanity will not necessarily keep him there for any great length of time, and that is something for you to consider. [Emphasis added.]

No objection was interposed to this line of argument. Prior to the arguments the court asked counsel whether they had

any written requested instructions, and Mr. Lane said he did not (T. 661). Nor, except for a request on diminished responsibility, did he have other oral requests for charges (T. 666). During the same discussion at the bench the prosecutor reminded the Court that "the instruction under the *Lyles*² case should be given, instructing the jury what will happen if they return a verdict of not guilty by reason of insanity." (T. 668.) Then this exchange occurred:

The COURT. The *Lyles* case requires me to do it unless counsel for the defendant expressly requests that I shall not do it. As I understand it you have not requested that I not do it.

Mr. LANE. Absolutely not. *I want you to give it.* [Emphasis added.]

The prosecutor in his argument expressly told the jury that following the argument the judge would "give you the appropriate instructions on the law of this case, which you will have to follow in deciding this case." (T. 671.)

At the close of the arguments for each side the time was 3:40 p.m. (T. 721). Accordingly, the judge told the jury that he thought it would be preferable to wait until the next morning to deliver his charge. He then said (T. 721):

Now, you have had the benefit of the arguments of counsel. With all candor, in a case of this kind the points of law are quite important. *You should not reach any judgment about your verdict, even in your own minds, until you have heard from me on the law. I ask you to please bear that in mind over night.*

I repeat my request to you to keep open minds until after the case, to keep open minds with respect to the issues you are called upon to decide, not to come to any judgment until I have given you the law as it applies to this type of case, not to discuss the case with anyone, not even to discuss it among yourselves, either this afternoon or tomorrow morning, until you get the case to decide. [Emphasis added.]

² An obvious reference to *Lyles v. United States*, 103 U.S. App. D.C. 22, 254 F. 2d 725, (1957).

The following morning the jury was charged as follows (T. 753):

If you find the Defendant is not guilty by reason of insanity, the accused will be confined to a hospital for the mentally ill until the superintendent has certified *and the Court is satisfied* the Defendant has recovered his sanity and will not in the reasonable future be dangerous to himself or to others, in which event and at which time *the Court shall* order his release *either unconditionally or under such conditions as to the Court seem fit*. [Emphasis added.]

Defense counsel did not object to this charge or suggest any elaboration upon it.

3. The jury instructions on the presumption of sanity, burden of persuasion, and reasonable doubt

The trial court charged the jury that the presumption of sanity remained in the case and was to be considered by the jury along with all other evidence on the issue of sanity (T. 748-749). Also, in instructing the jury on the law of insanity the judge occasionally said that to acquit the jury "must find" absence of mental disease or productivity, and must decide whether the accused "was" suffering from a mental disease. He also properly stated on numerous occasions that the Government had the burden of proving insanity or lack of productivity beyond a reasonable doubt (T. 724-753). The portions of the charge objected to on this point are set out in full in appellant's brief (Br. App. at 43-44) and will be discussed *infra*, Argument III. No purpose would be served by setting them out in full here. The trial court also charged the jury on the meaning of reasonable doubt in a manner to which appellant objects. This, too, will be considered *infra*, Argument III, and will not be further described here. No objection was made below to any of these portions of the jury instructions.

4. Polling the Jury

To assist the jury, the court had prepared verdict forms which set out the three different counts and the possible verdicts

under each count (T. 666-667; 754-756). In voting, the jurors marked their verdicts on these forms. After the verdict was announced in open court by the foreman, counsel for appellant requested that these forms be collected. That being done, counsel then asked that the jury be polled. The court then directed that the forms be returned to the jurors before the poll, as they had been prepared for the jurors to refer to on being polled (R. 772). The judge also said that each juror should receive his own form (*Ibid.*)

STATUTES AND RULE INVOLVED

Title 22, District of Columbia Code, Section 2401, provides:

Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402, rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any house-breaking while armed with or using a dangerous weapon, is guilty of murder in the first degree.

Title 22, District of Columbia Code, Section 501, provides:

Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.

Title 24, District of Columbia Code, Section 301, provides in pertinent part:

(d) If any person tried upon an indictment or information for an offense, or tried in the juvenile court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commission, the court shall order such person to be confined in a hospital for the mentally ill.

(e) Where any person has been confined in a hospital for the mentally ill pursuant to subsection (d) of this section, and the superintendent of such hospital certifies (1) that such person has recovered his sanity, (2) that, in the opinion of the superintendent, such person will not in the reasonable future be dangerous to himself or others, and (3) in the opinion of the superintendent, the person is entitled to his unconditional release from the hospital, and such certificate is filed with the clerk of the court in which the person was tried, and a copy thereof served on the United States Attorney or the Corporation Counsel of the District of Columbia, whichever office prosecuted the accused, such certificate shall be sufficient to authorize the court to order the unconditional release of the person so confined from further hospitalization at the expiration of fifteen days from the time said certificate was filed and served as above; but the court in its discretion may, or upon objection of the United States or the District of Columbia shall, after due notice, hold a hearing at which evidence as to the mental condition of the person so confined may be submitted, including the testimony of one or more psychiatrists from said hospital. The court shall weigh the evidence and, if the court finds that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others, the court shall order such person unconditionally released from further confinement in said hospital. If the court does not so find, the court shall order such person returned to said hospital. Where, in the judgment of the superintendent of such hospital, a person confined under subsection (d) above is not in such condition as to warrant his unconditional release, but is in a condition to be conditionally released under supervision, and such certificate is filed and served as above provided, such certificate shall be sufficient to authorize the court to order the release of such person under such conditions as the court shall see fit at the expiration of fifteen days from the time such certificate is filed and served pursuant to this section:

Provided, That the provisions as to hearing prior to unconditional release shall also apply to conditional releases, and, if, after a hearing and weighing the evidence, the court shall find that the condition of such person warrants his conditional release, the court shall order his release under such conditions as the court shall see fit, or, if the court does not so find, the court shall order such person returned to such hospital.

Rule 30, Federal Rules of Criminal Procedure, provides:

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

SUMMARY OF ARGUMENT

I. It was not improper for the prosecutor to tell the jury that if acquitted by reason of insanity Keys would be committed to St. Elizabeths Hospital, but not necessarily for a long time, and to refer in this context to the views of two senior Government experts that Keys was sane. These comments were made in response to misleading argument by the defense which suggested that if so acquitted Keys would be confined for "a long long, long, long time." A prosecutor may properly respond to a defense argument by referring to matters which might have been improper if brought in by him as an initial matter. *E.g.*, *Lawn v. United States*, 355 U.S. 339, 359, n. 15 (1958). The New York Court of Appeals has held proper a rebuttal argument substantially identical to that made here. *People v.*

Reade, 1 N.Y. 2d 459, 154 N.Y.S. 2d 27, 136 N.E. 2d 497 (1956). Other courts have held not improper similar rebuttal arguments alluding to the possibility of release on parole. *Anderson v. Commonwealth*, 353 S.W. 2d 381 (Ky. 1961), *cert. denied*, 369 U.S. 829; *People v. Griffin*, 60 Cal. 2d 182, 383 P. 2d 432, 32 Cal. Rptr. 24 (1963).

This rule is particularly appropriate where, as here, defense counsel informed the jury about the mandatory commitment law even though this Court has said only the judge should so say (*Catlin v. United States*, 102 U.S. App. D.C. 127, 128, 251 F. 2d 368, 369 (1957)), and where counsel also knew that the short form jury instruction on mandatory commitment—which this Court indicated was not to be expanded upon—approved in the *Lyles* case would not contain any reference to the duration of confinement. *Lyles v. United States*, 103 U.S. App. D.C. 22, 254 F. 2d 725, 728 (1957), *cert. denied*, 356 U.S. 961 (1958). Thus, by telling the jury that confinement might be for a very long time appellant obtained a decided advantage. Compare *Lyles v. United States*, *supra*. See also *Johnson v. United States*, 318 U.S. 189, 199–201 (1943).

Moreover, any reference to this matter beyond that contained in the short “*Lyles* charge” the judge did give would have merely emphasized the possibility of early release. Compare *Horton v. United States*, 115 U.S. App. D.C. 184, 317 F. 2d 595 (1963). And since the judge emphatically instructed the jury the night before the charge not to decide anything about the law or the case until it heard his charge, there is no merit to the claim that the jury must have made up its mind about this matter before it heard the “*Lyles* charge.”

In any event, such a comment is not ground for reversal where not objected to below, even when made by a trial judge, much less the prosecutor. *Lyles v. United States*, *supra*. The claim that the “*Lyles* charge” was inadequate under the circumstances must fail under Rule 30, F.R. Cr. P. See *Tatum v. United States*, 101 U.S. App. D.C. 373, 249 F. 2d 129 (1957). And “[i]n the absence of an objection to the closing argument of the prosecutor in a criminal case there is nothing for review” here. *Feguer v. United States*, 302 F. 2d 214, 253–254

(C.A. 8, 1962). See *United States v. Socony-Vacuum Oil Corp.*, 310 U.S. 150, 238-239 (1940).

Then, too, what is involved here is not merely a failure to object to the prosecutor's comments, but a conscious waiver of a matter raised in the first place for appellant's benefit. He cannot now challenge it here. *Johnson v. United States*, 318 U.S. 189, 199-201 (1943); *Lyles v. United States*, *supra*.

And even if improper the statement is not reversible error since the prosecutor's conduct was not "pronounced and persistent." *Obery v. United States*, 95 U.S. App. D.C. 28, 30 217 F.2d 860 (1954).

II. The trial court correctly refused to direct a verdict of acquittal by reason of insanity. Since it is undisputed that the evidence was in conflict on the questions of mental disease and productivity, the issue was for the jury. *Horton v. United States*, 115 U.S. App. D.C. 184, 317 F. 2d 595 (1963); *McDonald v. United States*, 114 U.S. App. D.C. 120, 312 F. 2d 847 (1962); *Williams v. United States*, 114 U.S. App. D.C. 135, 312 F. 2d 847 (1962); *Campbell v. United States*, 113 U.S. App. D.C. 260, 307 F. 2d 597 (1962). Appellant's characterization of the examinations by Government experts as superficial is baseless. Two of them (Drs. Owens and Platkin) examined Keys three different times, each time for a lengthy period of time, and all three Government experts had access to all of the data, medical and otherwise, in the hospital records. All three were more experienced and held more responsible positions than the defense experts. Moreover, three of the defense experts admitted Keys might have been faking symptoms of mental disease at the second staff conference at the Hospital, and Dr. Hamman—upon whose testimony appellant places chief reliance—had a serious question in his mind about this. Moreover, the testimony of the defense witnesses was in conflict on what the symptoms of Keys' disease were if he had one. And other defense testimony described Keys' symptoms in terms suggestive of a large proportion of the populace. The testimony of the psychologist, too, was not very persuasive and, indeed, he found nothing genuinely bizarre.

Nor was any alleged misconduct of the prosecutor responsible for the jury's rejection of the insanity defense. His cross ex-

amination of the psychologist was proper, and even if it was not the judge's comment that an objection was well taken cured the error. The prosecutor's eliciting of testimony on right and wrong was in accord with decisions of this Court and in any event resulted in testimony helpful to the defendant. Counsel approved in advance the jury instructions on this issue, which told the jurors that right-wrong was not an independently controlling consideration but only went to the issue of mental disease and productivity. The Court properly refused to charge on irresistible impulse when the request was made for the first time after the jury had retired and then asked for an additional instruction, since the request if then granted would have been prejudicial to Keys. And there was no evidence—or at least not more than a scintilla—on the point. *McDonald v. United States, supra*. And in a *Durham* jurisdiction refusal to so charge cannot be deemed harmful in any event.

The prosecutor did not, in fact, tell the jury, in the statement referred to by appellant, that the defense experts thought Keys was malingering, and even if the statement did suggest that it was substantially correct. The prosecutor's statement that the mental illness attributed to Keys was not recognized at St. Elizabeths prior to 1957 conceded that there was such an illness and that it was recognized there, so it could not have harmed appellant. Moreover, the judge told the jury that they should decide what the testimony was on this point, which cured any error if there was one. And the record was in fact confusing on this point.

Finally, appellant admits that refusal to charge on diminished responsibility was in accord with decisions of this Court.

III. The judge's instruction that the jury should consider all the evidence on the question of insanity, including the presumption of sanity which remains in the case, was in exact accord with decisions of this Court. *Greene v. United States*, 114 U.S. App. D.C. 266, 314 F. 2d 271, 272 n. 1 (1963); *Durham v. United States*, 94 U.S. App. D.C. 228, 214 F. 2d 862 (1954); *McDonald v. United States*, 114 U.S. App. D.C. 120, 312 F. 2d 847 (1962). The instructions, when read as a whole, as they must be, accurately informed the jurors that the Government had the burden of persuading them beyond a rea-

sonable doubt that at the time of the offense Keys did not have a mental disease or, if he might have had one, that his act was not the product thereof. See e.g., *Redfield v. United States*, 117 U.S. App. D.C. 231, 328 F. 2d 532 (1964). And the court's charge on the meaning of reasonable doubt could not have led the jury to find no reasonable doubt when in fact there was some. *Holland v. United States*, 348 U.S. 121, 140 (1954).

IV. The mere fact that the judge returned the verdict forms to the jury so the jurors could refer to them when being polled surely did not pressure the jurors into agreeing with the announced verdict if they wished to change their minds, particularly when the judge had said the forms had no official significance.

ARGUMENT

I

Defense counsel having told the jury that an insanity acquittal would result in confinement in a mental hospital for "a long, long, long, long time," it was proper for the prosecutor to tell the jury this was not necessarily true

(The portions of the transcript relating to Argument I are pp. 661, 666, 668, 671, 704-705, 706, 717-718, 721, 753.)

Appellant contends that the court should not have permitted the prosecutor to tell the jury that an acquittal by reason of insanity would send him to St. Elizabeths Hospital, "but not necessarily for a long time," and that in that context the jury should "think again" of the opinions of Doctors Owens and Platkin.

Aside from the fact that counsel expressly agreed that the prosecutor might make this kind of argument (a point we take up later), this contention is wrong on the merits. Preliminarily we note that it is not entirely clear what idea the prosecutor's reference to Doctors Owens and Platkin conveyed to the jury. It may have merely reminded the jury that since experienced psychiatrists holding responsible positions believed Keys to be sane it was therefore possible that he would be found sane reasonably soon after commitment. The statement did not necessarily suggest that since Owens and Platkin had overall control at their division at the hospital they per-

sonally would release Keys within a short time because they thought he was sane. We also note that appellant claims the reference to these doctors "proceeded beyond the scope of" the agreement with the judge and defense counsel that the prosecutor could rebut Mr. Lane's argument about probable duration of confinement. The conclusive answer to this is that neither Mr. Lane nor the judge made any objection to this remark; hence they must have thought it did not exceed the scope of the agreement or of permissible rebuttal. And, even taken with the gloss appellant puts upon it, this reference merely illustrated the proposition which Mr. Lane had agreed could be taken up with the jury.

1. The prosecutor's argument was perfectly proper rebuttal to what defense counsel had told the jury. It is undisputed that the prosecutor did not open the discussion of the likely duration of confinement at St. Elizabeths. He did not allude to it at all in his initial closing argument. But Mr. Lane then told the jury that such a verdict may result in confinement for "a long, long, long, long time." This undue emphasis upon the likely great length of confinement was unquestionably misleading and exaggerated, for it is entirely possible that confinement may be of short duration depending upon the ultimate decision of the hospital and the district court. Hence the prosecutor was perfectly correct when he told the judge that "the jury is under a misapprehension at this point." There is no suggestion in the record that any other motive but to clear up this misapprehension induced the prosecutor to make his remarks. And when he addressed the jury again the prosecutor did not fail to inform them that the public interest would be taken into account as well, for he twice noted that release would also depend upon a finding that Keys would not be dangerous to himself or others.³

It is settled that a prosecutor may properly respond to argument by defense counsel by referring to matters which might have been improper if brought in by the prosecutor as an initial matter. *Lawn v. United States*, 355 U.S. 339, 359 n. 15

³ See D.C. Code 24-301. Compare *Starr v. United States*, 105 U.S. App. D.C. 91, 264 F. 2d 377 (1958), cert. denied, 359 U.S. 936 (1959).

(1958); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 241-242 (1940); *Schmidt v. United States*, 237 F. 2d 542 (C.A. 8, 1956); *Schino v. United States*, 209 F. 2d 67 (C.A. 9, 1954); *Del Cristo v. United States*, 327 F. 2d 208 (C.A. 5, 1964); *United States v. Stromberg*, 268 F. 2d 256 (C.A. 2, 1959), *cert. denied*, 361 U.S. 863; *United States v. Battiato*, 204 F. 2d 717 (1953); *Padron v. United States*, 254 F. 2d 574 (C.A. 5, 1958); 5 *Wharton's Criminal Law & Procedure* § 2083 (Anderson ed. 1957).⁴

Appellant cites decisions holding that defense comments will not justify an improper government response.⁵ But that argument begs the very question presented here, which is whether, considering what defense counsel had said, the prosecutor's response *was* improper. The cited cases show only that the prosecutor's response may not go too far, beyond what is justified as proper rebuttal; they do not suggest that any statement which would be improper if not made in rebuttal is necessarily improper even when made in rebuttal.⁶

A very similar problem came before the Court of Appeals of New York in *People v. Reade*, 1 N.Y. 2d 459, 154 N.Y.S. 2d 27, 136 N.E. 2d 497 (1956), where a death sentence had been imposed. The prosecutor in his closing argument told the jury (1 N.Y. 2d at 462):

Well, if you find him insane, ladies and gentlemen, you will have no assurance whatsoever that he won't be back out again * * * when he satisfies the [mental health] Commission that he is sane, as he is, that will be the end, he will be back out. No assurance whatsoever have you that they will keep him out of society. And, ladies and gentlemen, that you cannot afford to let happen.

This statement was in response to defense counsel's argument, the effect of which was "to convey the idea to the jury that,

⁴ This Court has applied a similar rule to a prosecutor's questioning of a defendant. *Hall v. United States*, 84 U.S. App. D.C. 209, 171 F. 2d 347, 349 (1948). See also *Hoeppel v. United States*, 66 U.S. App. D.C. 71, 76-77, 85 F. 2d 237 (1936).

⁵ *Dugan Drug Stores, Inc. v. United States*, 326 F. 2d 835, 837 (C.A. 5, 1964); *United States v. Curtiss*, 330 F. 2d 278 (C.A. 2, 1964).

⁶ This is conclusively demonstrated by the *Del Cristo*, *Padron*, and *Stromberg* cases, *supra*, decided by the same courts which decided the two cases relied upon by appellant, *Dugan Drug* and *Curtiss*.

if they found the defendant insane, he too would go to an institution, there to remain until he died, and that that would prevent his return to society."

The New York Court of Appeals held (1 N.Y. 2d at 462):

The District Attorney contends, and we agree, that that portion of his summation was a fair reply to remarks made by the defense. * * * we believe that the District Attorney had the right to answer the suggestion made by defense counsel that the jury could prevent defendant's returning to society during his life by finding him insane *by pointing out that such a finding by the jury could bring no such assurance. We are not prepared to say that his language was prejudicial under the circumstances.* [Emphasis added.]

In *Anderson v. Commonwealth*, 353 S.W. 2d 381 (Ky. 1961), cert. denied, 369 U.S. 829, another death sentence case, defense counsel in his closing argument "made reference to the possibility of imposing punishing of life imprisonment without parole." In response the prosecutor informed the jury that "there is no such thing as life without parole * * * , no such law has been passed," and went on to urge the jury not to let the accused out to kill again. The Court of Appeals of Kentucky held the prosecutor's statement to be "proper by way of response" since no possibility of life imprisonment without parole then existed although legislative efforts in that direction were being made. 353 S.W. 2d at 387-388.⁷

In a similar case the Supreme Court of California reached the same result, even where the defense argument does not seem to have invited the prosecutor's reply. In *People v. Griffin*, 60 Cal. 2d 182, 383 P. 2d 432, 32 Cal. Rptr. 24 (1963), also involving a death sentence, the court held (32 Cal. Rptr. at 30):

* * * it was not improper for the district attorney to argue that in the event the jurors returned a verdict of life imprisonment, it would be their responsibility if defendant was released and harmed anyone. He was

⁷ Cf., also, *People v. Pieper*, 410 Ill. 15, 101 N.E. 2d 109, 112 (1951). Compare *Commonwealth v. Smith*, 172 N.E. 2d 597, 601-602 (Mass. 1961).

merely replying to defendant's argument that the jurors would be responsible if they returned a death sentence and it was subsequently established that defendant was innocent. It is not misconduct for a prosecutor to reply to defense arguments as long as his comments are based on the record as were these.⁸

What appellant is saying that as a matter of trial strategy defense counsel should be able to tell the jury something they were not entitled to hear at all, but the Government must be powerless to respond. As appellant himself points out in his brief, this Court has said that defense counsel should not tell the jury about mandatory commitment. *Catlin v. United States*, 102 U.S. App. D.C. 127, 128, 251 F. 2d 368, 369 (1957).⁹ This Court has also said that the short form instruction given here by the trial judge *in haec verba* from the *Lyles* opinion should not be expanded upon. *Lyles v. United States*, 103 U.S. App. D.C. 22, 25, 254 F. 2d 725, 728 (1957), *cert. denied*, 356 U.S. 931. Defense counsel was familiar with the *Lyles* case and knew what instructions on this point that decision had recommended (T. 668). He therefore knew that in following the *Lyles* admonition the trial judge would not tell the jury anything about the possible duration of confinement (beyond the bare statement that Keys would be confined until found sane and not dangerous, etc.). Yet counsel deliberately told the jury that Keys might be confined for "a long, long, long, long time." He thereby obtained a real advantage, informing the jury of something they were not entitled to be told. Having obtained this advantage, he agreed the prosecutor could

⁸ Of course, as we have noted, the prosecutor's statement should not exceed proper limits. See *Dunn v. State*, 166 So. 2d 878 (Ala. 1964), where defense counsel's summary of the mandatory commitment law contained no reference to duration of confinement, but the prosecutor responded that the jury knew very well that if defendant were sent to the state mental hospital "he wouldn't stay up there more than ten days." An objection was made and overruled. This was held reversible error by the Alabama Supreme Court, since nothing said by the defense would justify the prosecutor's discussion of probable duration of confinement. Moreover, the explicit reference to a ten day confinement was certainly inflammatory and probably factually baseless. The Court was careful to note, moreover, that this kind of impropriety could be cured by sustaining an objection to it, if made.

⁹ The Court said the judge should do this, not counsel.

respond. But defense counsel must have felt the net result would be favorable to him. Having made this decision as a matter of trial tactics, appellant cannot object here. Compare Part IV of the *Lyles* opinion, 103 U.S. App. D.C. at 28-29, 254 F. 2d at 732-733, where a similar have-your-cake-and-eat-it-too gambit was rejected by this Court. And see *Johnson v. United States*, 318 U.S. 189, 199-201 (1943).

Moreover, we do not see how the judge could have added anything to the "Lyles charge" without merely emphasizing the possibility of early release from St. Elizabeths. Compare *Horton v. United States*, 115 U.S. App. D.C. 184, 317 F. 2d 595 (1963).¹⁰ He told the jury Keys would stay there until he was found sane and not dangerous and the Court was satisfied of this. That was an accurate statement of the law and must have left an accurate understanding in the jury's mind. There is also no merit to the suggestion that the *Lyles* charge was inadequate because the court left the prosecutor's statements in the minds of the jurors overnight before giving the "Lyles" instruction. The judge told the jury, with great emphasis, that they were not to make up their minds about anything until they heard from him on the law.¹¹

3. Moreover, even assuming the prosecutor's statement was improper, it is not grounds for reversal, especially where it is not objected to below. In *Lyles v. United States*, 103 U.S. App. D.C. 22, 254 F. 2d 725 (1957), *cert. denied*, 356 U.S. 931, the judge told the jury that an insanity acquittal would result in defendant's confinement in St. Elizabeths "until he is cured and it is deemed safe to release him; and when that time arrives he will be released and will suffer no further consequences from this offense." Then "immediately" thereafter he said (103 U.S. App. D.C. at 26, 254 F. 2d at 729):

I think I should add that Dr. Cushard of St. Elizabeths Hospital testified, as you will recall, that on a prior

¹⁰ In *Horton* this Court said (115 U.S. App. D.C. at 186, 317 F. 2d at 597): "In this context the court's well intended and repeated efforts to overcome the effect of the inadvertent reference to competency to stand trial would tend to emphasize rather than eradicate what 18 U.S.C. § 4244 commands the jury must not be told."

¹¹ See *supra*, p. 6.

occasion he found no mental disorder whatever in the defendant, and that the defendant was a man of average intelligence.

Lyles argued that this remark, in context, conveyed to the jury "an emphatic inference that if so committed Lyles would shortly be released." *Id.* at 729. But this Court "decline[d] to reverse this case on this point," observing *inter alia* that the remark was a single sentence in the middle of a long charge, was not objected to at the trial, and "cannot be held to have affected substantial rights" within the meaning of Rule 52(b).¹² Moreover, there was a suggestion of conscious waiver (as to this, see *infra*). Surely if the comment of a judge to this effect is not ground for reversal, it must follow *a fortiori* that a similar single comment of a prosecutor cannot invalidate a conviction. *Cf. Blunt v. United States*, 100 U.S. App. D.C. 266, 276, 244 F. 2d 355, 365 (1957).

Of course, insofar as appellant claims the "Lyles charge" given here was inadequate under the circumstances to correct the jury's impression about quick release, *Lyles* itself establishes that failure to object waives the point. See Rule 30, F.R. Cr. P. See also *Tatum v. United States*, 101 U.S. App. D.C. 373, 388-389, 249 F. 2d 129, 132-133 (1957), refusing to consider error with respect to the mandatory commitment charge where no objection was taken below. A similar principle governs failure to object to the comments of a prosecutor. It is settled that "[i]n the absence of an objection to the closing argument of the prosecutor in a criminal case there is nothing for review" on appeal. *Feguer v. United States*, 302 F. 2d 214, 253-254 (C.A. 8, 1962). "Counsel for the defense cannot as a rule remain silent, interpose no objections, and after verdict has been returned seize for the first time on the point that the comments to the jury [by the prosecutor] were improper and prejudicial." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-239 (1940).

¹² *Cf. also, Starr v. United States*, 105 U.S. App. D.C. 91, 95-96, 264 F. 2d 377, 382-383 (1957), and dissenting opinion, 91 U.S. App. D.C. at 97-98, 264 F. 2d at 384-385; *Bradley v. United States*, 102 U.S. App. D.C. 17, 249 F. 2d 922, 925-926 (1957), and dissenting opinion, at 930-931.

It is true that before *Lyles* this Court did reverse in two cases where judges had commented upon the possible duration of confinement. In the second *Durham* case¹³ the judge, while telling the jury about confinement upon an insanity acquittal, also told them that St. Elizabeths had found Durham *competent to stand trial*, and that if the doctors "adhere to their last opinion * * * he will be released very shortly." 99 U.S. App. D.C. 132, 237 F. 2d 760, 761. This was held to be error compounded, because (a) a federal statute forbids disclosing a competency determination to the jury, (b) competency is not necessarily the same as sanity, and (c) the warning to the jury that Durham would be released shortly implied dire consequences if they acquitted for insanity. It is not clear what the result would have been had only the third point alone been involved. But again we point out that it was the *judge* who had made the statement, not the prosecutor. Even more extreme and factually erroneous besides was the situation in *Blunt*,¹⁴ when the judge—the judge again—warned the jury that "if they acquit the accused, they will be releasing a dangerous man to prey upon society," without any suggestion that a mandatory commitment law existed. 100 U.S. App. D.C. 278, 244 F. 2d at 367 and note 28.¹⁵

In any event, this case does not involve a mere failure to object. This is a case of conscious waiver. Not only did defense counsel here expressly agree that the prosecutor might argue the point, and fail to make any objection to the argument that followed, he also failed to offer any proposed additional instructions on the matter when invited to do so, asked the court to give the short "Lyles" charge, and failed to object to the charge as given. Moreover, as earlier noted, the issue was raised in the first place for the benefit of the appellant. Compare *Johnson v. United States*, 318 U.S. 189, 199–201 (1943);¹⁶ see also *Lyles v. United States*, *supra*.

¹³ *Durham v. United States*, 99 U.S. App. D.C. 132, 237 F. 2d 760 (1956).

¹⁴ *Blunt v. United States*, 100 U.S. App. D.C. 266, 244 F. 2d 355 (1957).

¹⁵ Cf. *Horton v. United States*, 115 U.S. App. D.C. 184, 317 F. 2d 595 (1963).

¹⁶ In *Johnson* the prosecutor commented on the accused's failure to testify, but the Court, although finding the comment improper, refused to reverse, saying:

But we do not grant a new trial because of one circumstance which seems to us controlling. As we have noted, though an exception was

Finally, this single sentence in the prosecutor's argument surely is not grounds for reversal in any event. See *Obery v. United States*, 95 U.S. App. D.C. 28, 30, 217 F. 2d 860 (1954), where this Court refused to reverse for prosecutorial misconduct because it could not "conclude that 'misconduct was pronounced and persistent' * * *."

4. Appellant claims that the prosecutor's references to Drs. Owens and Platkin were "grossly misleading" (Br. App. 31), for four reasons. First, it is claimed that Keys might be confined elsewhere than St. Elizabeths. But the fact is that the vast majority of persons acquitted for insanity are committed there. Second, it is urged that even if Keys went to St. Elizabeths Doctors Owens and Platkin "might have no role whatever" in the determination of Keys' eligibility for release. But

taken to the prosecutor's comment on petitioner's refusal to testify, it was later withdrawn. And when the court invited counsel to bring to its attention any objections or requests to charge, counsel did not renew the objection. Nor was any request made to charge the jury on the matter. * * * And when the court stated what charge it would give the jury on the point, counsel for the defense stood by and voiced no protest or objection. We can only conclude that petitioner expressly waived any objection to the prosecutor's comment by withdrawing his exception to it and by acquiescing in the treatment of the matter by the court. It is true that we may of our own motion notice errors to which no exception has been taken if they would "seriously affect the fairness, integrity or public reputation of judicial proceedings." [citing cases] But we are not dealing here with inadvertence or oversight. This is a case where silent approval of the course followed by the court (*Boyd v. United States*, 271 U.S. 104, 108) is accompanied by an express waiver of a prior objection to the method by which the claim of privilege was treated. * * * "Plainly enough, counsel consciously and intentionally failed to save the point and led the trial judge to understand that counsel was satisfied * * *." We cannot permit an accused to elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him. However unwise the first choice may have been, the range of waiver is wide. Since the protection which could have been obtained was plainly waived, the accused cannot now be heard to charge the court with depriving him of a fair trial. The court only followed the course which he himself helped to chart and in which he acquiesced until the case was argued on appeal. The fact that the objection did not appear in the motion for new trial or in the assignments of error makes clear that the point now is a "mere afterthought."

while they "might" *not*, they also "might," and since they are in charge of the maximum security division there is a fair inference that they *would*.

Third, it is said that "the standard of determining eligibility for release is different from that for determining mental responsibility for the offense." (Br. App. 31.) This, of course, is true and the prosecutor did not argue otherwise. He made no reference to competency to stand trial. And he expressly told the jury about the dangerousness requirement of D.C. Code 24-301 (as did defense counsel, and later the judge).

Finally, appellant urges that "the decision on whether or not to release the patient in such circumstances" would be made by the court as well as the doctors, and the doctors' word would not be final. Br. App. at 32. This is quite true, but it is beside the point since the court explicitly instructed the jury to that effect, which must be deemed to have cured this "error," if it be such.

It is thus apparent that appellant's characterization of the prosecutor's reference to the two doctors as "grossly misleading" is itself grossly exaggerated. It is highly doubtful, indeed, that it was misleading at all.

5. Even if the prosecutor's statement was improper or misleading the error was harmless, since it told the jury only what it already knew from the evidence and proper arguments and implied nothing the jury would not have been able to infer on its own. The statement told the jury that Doctors Owens and Platkin were in charge of the maximum security division at St. Elizabeths and had the last word there. This the jury had been properly told time and time again.¹⁷ It was only after much

¹⁷ Thus, Dr. Hamman, a defense witness, testified that Doctors Owens and Platkin were senior to him at St. Elizabeths and that Owens was in charge of the maximum security division and Platkin the next in command. T. 378. Dr. Agler, also a defense witness, stated that he was junior to Owens and Platkin at the hospital. T. 420. Dr. Platkin testified that he was in charge of the John Howard Pavilion (the maximum security division) and that Doctors Dabney, Hamman and Agler (defense witnesses) work under him. T. 531, 533-534. Dr. Owens testified that he was clinical director of the maximum security unit, that he was "actually in charge of the over-all operations of the building * * *," and was "supervisor" of the experts called by the defense. T. 607, 608. And the prosecutor, in his initial closing argument, reminded the jury that these defense psychiatrists were

prior testimony and other legitimate references to these facts had clearly informed the jury as to the chain of command at St. Elizabeths that the prosecutor once told the jury to keep in mind the views of Owens and Platkin in thinking about the duration of confinement. Hence this statement, even if improper, was merely cumulative of what the jury was well aware of, and for that reason alone surely cannot be deemed harmful error. See *Crockett v. Commonwealth*, 187 Va. 687, 47 S.E. 2d 377, 383 (1948). Cf. *Hall v. United States*, 84 U.S. App. D.C. 209, 171 F.2d 347, 350 (1948).

II

The trial court's refusal to direct a verdict of acquittal by reason of insanity was manifestly proper

(The portions of the transcript relating to Argument II are pp. 40, 175-177, 181-183, 195-197, 199, 203-205, 226, 230, 314-315.)

1. Appellant argues that the court should have directed a verdict of acquittal by reason of insanity because on all the evidence "a reasonable mind must necessarily have had a reasonable doubt as to whether or not the offenses charged were the product of a diseased mind." Br. App., at 33. But even a cursory reading of the record discloses a conflict in the evidence on the questions of the existence of mental disease

"all junior to the Clinical Director, Dr. Owens, the Chief of the John Howard Service, Dr. Platkin, and Dr. Dorothy Dobbs, one of the senior staff psychiatrists." T. 683. Later, he again referred to Owens, Platkin, and Dobbs as "the senior staff psychiatrists at St. Elizabeths hospital directly refuting the testimony of the [defense] doctors." T. 685. And defense counsel elicited from Dr. Owens the response that he was "in charge of" the maximum security division (T. 638). Then defense counsel, in his closing argument stated that "Dr. Owens is the chief." T. 697. And, finally, in rebuttal argument the prosecutor began his statement to which appellant objects by reminding the jury that Owens "runs the show over there" and that Platkin is "next in command." As the context plainly shows, this was said, perfectly properly, as part of the argument that the jury should not acquit by reason of insanity "in the face of the testimony of the Clinical Director of St. Elizabeths Hospital, and the Chief of the Staff Psychiatrists at St. Elizabeths Hospital." Again, the prosecutor went on to characterize the defense pleas as "asking you to acquit by reason of insanity over their testimony, doctors who are the superior doctors at the hospital." T. 717.

and productivity. That being so, the Government was entitled to reach the jury on this issue. See *Horton v. United States*, 115 U.S. App. D.C. 184, 185, 317 F. 2d 595, 596 (1963), where this Court made short shrift of an argument that such a directed verdict was required, as follows:

On trial his sole defense was insanity based on drug addiction. Two psychiatrists testified that appellant was without mental disease, three psychiatrists testified that appellant's acts were the product of mental disease, and one psychiatrist testified simply that appellant was mentally ill. Thus a jury issue was presented on the issue of criminal responsibility. *McDonald v. United States*, 114 U.S. App. D.C. 120, 312 F. 2d 847 (1962).

Aside from *McDonald*, see also *Williams v. United States*, 114 U.S. App. D.C. 135, 312 F. 2d 847 (1962); *Campbell v. United States*, 113 U.S. App. D.C. 260, 307 F. 2d 597 (1962). "[S]ince the question of whether the defendant has a disease or defect is ultimately for the triers of fact, obviously its resolution cannot be controlled by expert opinion." *McDonald v. United States*, *supra*. Moreover, since all the experts in this case agreed that Keys was not psychotic, cases in which this Court has ordered that a directed verdict be entered are inapposite, as this Court has "previously found error in the failure of the District Court to direct verdicts of not guilty by reason of insanity only where the evidence of mental disease has been very strong and the condition a serious one," citing in a footnote cases involving evidence of psychosis. *Campbell v. United States*, *supra*. See also *Turberville v. United States*, 112 U.S. App. D.C. 400, 303 F. 2d 411 (1962). We shall also show that far from being "very strong," the evidence of mental disease here was quite unconvincing.

2. Appellant seeks to avoid the result compelled by these decisions by disparaging the testimony of the Government's expert witnesses. Doctors Owens and Platkin each examined Keys on three separate occasions during his two commitments at the Hospital, once shortly after he first arrived, then later at the first staff conference, and again at the second staff during

his second commitment (T. 560, 609-611, 633-634, 592). Dr. Platkin also saw him briefly at the beginning of his second commitment (T. 536). The first time they were with Keys for about 45 minutes, and each staff conference lasted probably more than an hour with Keys actually present for about 45 minutes each time. Doctor Dobbs was present at the first staff conference. Dr. Platkin estimated that he was in *actual contact* with Keys for three to four hours; Doctor Owens, for more than 2½ hours; and Dobbs, for about 45 minutes. And, of course, at the staff conferences these doctors had access to all the pertinent data.¹⁸

The time spent by the Government witnesses with Keys and analyzing his case thus compares favorably with the time devoted to the case by the defense witnesses. Compare T. 318, 410-411. Dr. Stammeyer (the psychologist) of course spent a good deal of time *administering psychological tests* to Keys, but he is not a psychiatrist and his conclusions were primarily based upon those tests alone (T. 523). As Dr. Owens said, the psychological tests "are limited in their scope." T. 630.)¹⁹ It is therefore improper to compare the time the psychologist spent giving tests with the time spent by psychiatrists analyzing the case. Of course, Dr. Hamman saw Keys "several times" (T. 379) alone prior to the first staff conference, because he did the psychiatric case study in March 1963 (T. 631). But unless every case is to turn upon the opinion of the single doctor who does the case study, that alone can surely not be decisive.

¹⁸ The examination of appellant conducted here by the Government's experts was more extensive than that approved by this Court in *Carey v. United States*, 111 U.S. App. D.C. 300, 296 F. 2d 422 (1961).

¹⁹ He also said (T. 630-631):

Well, the psychologists at Saint Elizabeths are not arriving at opinions, medical opinions or psychiatric opinions. They only express their opinion on the basis of their tests.

The psychological tests are only one of many examinations that we conduct at Saint Elizabeths. The psychiatrist evaluates all of the examinations, including the psychological, and arrives at an opinion, the overall opinion.

[The psychologist] can express a diagnosis and an opinion on the basis of his tests. But he does not express a medical opinion. This is limited to the psychiatrist.

Appellant's suggestion that Dr. Hamman's views are entitled to great weight suggests another interesting point. He (as well as Drs. Owens and Platkin) observed a change in Keys' behavior during the second staff conference in January of 1964. Drs. Owens and Platkin thought Keys was malingering, i.e., faking symptoms of mental disease (T. 537-538, 612-613, 621-622). Dr. Hamman said Keys might have been malingering and that there was a "serious question" in his (Dr. Hamman's) mind about it (T. 403). Moreover, Dr. Agler was not sure whether Keys was faking or not, but admitted that there is a great deal of motivation to do so under the circumstances (T. 421-422). And Dr. Stammeyer testified that some of Keys' answers at the second staff conference were not "genuinely sincere." (T. 479.) Only Dr. Dabney, of all experts who were at the second conference, did not think Keys could have been malingering.

Indeed, with two Government experts expressing the view that Keys was malingering at the second conference and three defense doctors indicating that might be true, a reasonable jury could surely find that Keys' symptoms at the second conference were false, and from that draw the inference that he was sane then and at the time of the offense.

Appellant's attack upon the legitimacy of the first examination by Owens and Platkin (shortly after Keys' first admission and prior to the first staff conference) (Br. App. at 35), is similarly groundless. While the immediate purpose of this interview (by Platkin and Owens) was to determine if Keys could adequately handle a problem about the disposition of his children, (T. 610) such an interview "has psychiatric value" (T. 544).²⁰ There is no expert testimony that it does not. And

²⁰ Dr. Platkin said (T. 549-550) :

When I am with a man for a half, three-quarters of an hour, I am watching his responses.

These to me have very important psychiatric value even though the purpose of my visit may be to explain a particular legal document.

When I spend a certain amount of time with a patient, whatever he says and whatever he does and however he responds to me have very definite psychiatric overtones.

some account should certainly be taken of the fact that all three Government witnesses were much more experienced than the three defense psychiatrists.

3. Appellant also points out that the Government's experts did not dispute the psychologist's findings or conclusions. This is a mere semantic quibble. What they did not dispute was Stammeyer's description of Keys' personality; but in their opinion such a personality did not necessarily indicate mental illness, as they explained at some length. (See T. 578, 617, 654, 595, 596, 599, 603-604.)

Again, appellant attempts to counter this testimony by castigating the Government experts for dealing in "conclusions." (Br. App. at 35.) But it is clear from the record that much more than merely a question of nomenclature was involved. All three Government experts agreed that passive-aggressive personality, or paranoid personality, or some similar type of personality disorder, could in some circumstances be sufficiently severe to be a mental illness (T. 578, 654, 655, 656, 659, 596, 603-604). But Dr. Platkin thought Keys' condition did not amount to mental illness (T. 578); Dr. Owens found that (T. 650, 654, 655, 659) Keys' condition was not sufficiently extreme "to the point where it is a mental illness" (T. 659); and Dr. Dobbs said that although Keys had "shown features of a passive-aggressive personality," "the question arises as to whether this is of sufficient proportions to make it a mental illness," and "in my opinion it is not." (T. 603.)

It is absurd to say that these judgments are legal conclusions. An opinion that test results did not show sufficient deviation from the norm to constitute a mental illness is surely a psychiatric, not merely a legal, conclusion. And their medical "opinions are exactly what is sought" [emphasis the Court's], *Blunt v. United States*, 244 F. 2d 355, 365, 100 U.S. App. D.C. 266 (1957). Moreover, the Government experts testified in plain and simple language that they did not find any symptoms of mental illness. Assuredly such a statement is not a legal conclusion. Moreover, Owens and Platkin explained in detail why they believed Keys was faking at the second conference (T. 537-538, 612-613, 621-622), Dr. Owens

stating that "the symptoms he was displaying * * * didn't fit into any pattern of mental illness * * * [and] were not consistent with any diagnosis of mental disease." (T. 612-613.) Of course, there is no conceivable psychiatric testimony on the issue of insanity that would not be open to the charge that it was somehow at least suggestive of a legal conclusion. Indeed, unless it *could* be so characterized it would be irrelevant and immaterial.

4. Not only was the Government's expert testimony perfectly satisfactory, but the testimony of the defense experts suffered from a number of infirmities. We do not suggest, of course, that the jury could not have credited these opinions. The question here is only whether as a matter of law the jury *must* credit them. The defense testimony should be viewed in that light.

The defense experts were in conflict upon what must have seemed to the jury a key issue—what the symptoms of Keys' disease were if he had one. For instance (T. 321-322, 374, 389):

Q. Now, Doctor, with respect to the paranoid personality, could you say with respect to such a person that as to their outward appearance, would they to a layman necessarily constantly show evidence of the paranoid tendency which you have described?

Dr. DABNEY: *Even to a layman.* For instance, this type of individual has a disturbance in affect—affect being his total emotional appearance—*by sight*. In other words, this type of individual may look angry or moody. So as a result, *if you pass this individual on the street, you would tend to sort of at least avoid them* or try not to get too close to them because *they always appear angry, hypersensitive*. You wouldn't want to bump into them accidentally lest there be a lot of confusion or disturbance.

Contrast that with this:

Q. Is it you—is it correct to say that a person of that nature could outwardly appear to be normal and—

Dr. HAMMAN: Yes * * *. Since there is nothing

particularly outstanding at any given time, many people are likely not to notice it.

* * * *

Q. [What symptoms did Keys have?]

Dr. HAMMAN: You don't make a diagnosis of a personality disturbance on symptoms; *you don't see any symptoms.*

As noted, Doctors Owens, Platkin, and Dobbs testified that one of their reasons for believing that Keys did not have a mental disease was that he did not deviate sufficiently from the norm (T. 578, 617, 654, 595-596, 603-604). What they had in mind is probably best reflected in testimony of the defense experts, some of whom described Keys' symptoms in terms suggestive of a rather large proportion of the general populace. At the same time their explanations might well have raised troublesome questions in the minds of the jurors about whether certain conduct historically deemed morally praiseworthy must be considered symptomatic of mental disease. Thus, Dr. Hamman's testimony (T. 390):

Q. * * * you say he was dependent. What did you find in his background that allowed you to arrive at that conclusion?

Dr. HAMMAN: His way of relating to [his second wife], the fact that he would do things for her and would expect to get something for it, and when nothing was forthcoming when his needs were not satisfied, *he would continue to try to please her* (T. 390).

Again (T. 390-391):

Oh, he would buy her things, that he had her hair done, that *she would go out for days at a time and he wouldn't know where she was*, and would act quite nonchalant when she came back, *and he would be extremely worried about this.*

Q. Well, he continued to live with her, though, did he not?

Dr. HAMMAN: Yes. *This is again characteristic of this type of individual.* They cannot extract themselves from this type of morbid dependent relationship.

Dr. Hamman also based his diagnosis upon "the development of anxiety after the death of his first wife" (T. 394) and, the fact that in marrying Priscilla Keys chose "such an unlikely partner" (T. 395). Dr. Hamman also thought Keys was "dependent on his first wife," his reason for thinking so being that Keys was "quite dependent on her, quite fond of her, and apparently quite shook up when she died" (T. 396).

Dr. Agler's testimony also might have suggested to the jury that a good many ordinary people have problems like Keys'. The evidence he offered for his diagnosis was that Keys seemed "quite indecisive about the marriage itself," and he should not have married Priscilla if he was indecisive (T. 425). A normal "aggressive" man would not, he said, marry a woman until he was convinced he wanted to. Keys was also quite "upset" about his marriage. Another sign was that (T. 425):

After the marriage, he was very concerned about his wife [*sic*] fidelity. Seemed quite upset about it; feared that she was seeing other men; would come home early and await her arrival. Rather than doing something about it, he seemed to become quite passive about it. *Seemed to engage in a great deal of fear that she was faithless, and wishing that she weren't.*

I think that a more *appropriately* aggressive man would have either persuaded her to give up undesirable behavior or *would have left her. But he didn't leave her. He later found out that his fears were at least partly true.* He still did not insist upon her reforming, *nor decide upon leaving her to find someone else.*²¹

Dr. Agler also said:

Q. Well, do you consider the fact that someone is uncertain about marriage as being a mental illness?

A. Well, as I say, it depends on just how undecided they are (T. 427).

And again (T. 429):

²¹ Interestingly enough, the record does show that Keys either told his wife to leave or at least decided to give up their relationship and permit her to leave, and she did so.

[People with this illness] *have to please their parents and their mates and what not.* And because of this, they defer appropriate aggressive action.

And then (T. 431):

Q. Aren't there many people who are presidents of banks and important doctors and lawyers and other people who may have symptoms along these lines.

A. Yes.

Q. Of indecisiveness?

A. Yes, and they sometimes indulge in inappropriate behavior, too.

Q. Would you think that all of those people are mentally ill?

A. Yes.

Q. You would think they were all mentally ill?

A. If they behaved that way, yes.

Again, we emphasize that the question here is not whether a jury *may* credit this testimony, but whether it *must* do so. We turn now to Dr. Stammeyer's testimony. During administration of the Rohrschach tests one ink blot looked to Keys like a bat. This was a popular response, but he also saw some "feathers falling off." Dr. Stammeyer said (T. 492-493):

Questioned about the feathers, he said he know how a fowl might would fly and the feathers come off, just getting up.²²

* * * * *

Q. Now did you find anything unusual about his answer to that particular design.

A. Yes, sir. * * * The initial thing he starts out as a bat. This is a popular response. This is a good response. He goes along pretty well describing the bat. *Then he gets involved with this feathers falling off.* A bat doesn't have feathers, and this indicates some loss of category here, some confusion in his mind. And in addition, these tiny aspects of falling apart, disintegrating in this fashion, this is atypical of what the average person sees So this indicates a deviation * * * *

²² The witness was reading his notes and reciting Keys' responses in Keys' words.

this type of thinking is not within the range of what the average functioning person would do.

Another response of Keys' was said to deviate from the norm partly because he failed to say that the ink blot looked like Theodore Roosevelt (505-506). And while Dr. Stammeyer emphasized Keys' "unpopular" responses, he equivocated when it was pointed out on cross examination that Keys had given some "popular" responses, first saying "An eight year old child can give these [particular] popular type answers," then suggesting that while the "popular" responses Keys gave showed him to "depend on seeing the world as other people see it" (T. 508), Keys gave many deviant responses. This certainly could not have impressed the jury. And while he said that not many people that function independently on the outside fall in the extreme that Keys falls into, he admitted that Keys was working on the outside, then said working is actually a "poor indication of mental health", but finally admitted it was an indication, "a good start." (T. 516-517.)

With respect to the Projective Drawing Test, Dr. Stammeyer thought this was the most deviant aspect of the test material, because, among other things, Keys drew a female without arms, showed "two breasts in a female in profile," (T. 520), and drew figures which had "a vacant look in the eyes" (T. 521). Moreover, he said "the stance of the male figure is so off balance there that a person like this—a person standing in this stance could certainly not be stable." (T. 521.)

We are, of course, giving selective examples, and not the full picture. But admitting that Dr. Stammeyer's analyses are fully professional, the question remains whether the jury must accept them as revealing mental disease and must further accept his views on productivity. It should be noted, by the way, that Dr. Stammeyer said that in none of the tests he administered to Keys did he "find anything genuinely bizarre." (T. 512-513.)

Moreover, the expert testimony conflicted with the lay testimony on a crucial point. While defense experts said that Keys' illness must have begun in childhood, all the lay testimony is to the effect that he was a normal child and had a normal child-

hood. See p. 3, *supra*. No could the experts say they knew of anything unusual in his early life (T. 345-346, 392-393).

And, although appellant points out that there was testimony that appellant's I.Q. was 78, Stammeyer also found that he had a potentially high average intelligence (T. 482); see also Tr. 398. As to the voices and visions the lay witnesses referred to, they always occurred at night and they may well have been simply dreams, as a witness referred to them (T. 246, 256). And surely there is nothing remarkable about a person who, *shortly* after his wife dies, says he cannot believe she is dead (T. 249), a point appellant relies on (Br. App. at 7). Other testimony that appellant was disturbed, depressed and nervous hardly requires a directed verdict. The testimony that he attempted suicide is fuzzy (T. 188-189); there is testimony that he only talked about doing so (T. 442), and there is expert testimony that attempted suicide is not necessarily indicative of mental disease (T. 600). When he was admitted to D.C. General Hospital earlier the diagnosis was alcoholism, not mental illness (T. 397). It should be remembered that most of this lay testimony came from Keys' family and the rest of it from friends of his or of the family's—clearly interested witnesses. In sum, however, none of the lay testimony demonstrates that he had a mental disease at the time of the offense (most lay witnesses had not seen him for quite some time before that) and it surely says nothing about productivity.²³

5. Appellant also claims that alleged misconduct of the prosecutor might have led the jury to reject the insanity defense.

²³ Appellant notes in his statement of facts, but does not mention in his argument, that during his first admission Keys had been receiving some equanil and placydil, both tranquilizers (T. 365, 406-C, 577). It is not clear how long Keys received this medication. Dr. Platkin said he could not generalize about whether taking equanil would have an effect on the patient's action at the conference (T. 569), but that he did not think "it would have a significant effect." (569.) Some patients at the hospital are given equanil before psychiatric examinations (T. 570), though in general it would be better not to do this, "but it needn't make any significant change." (T. 570.) And he said equanil is very mild, doesn't affect "one's intellectual capacities, abilities, or reactions even." (T. 570.) Moreover, the equanil and placydil was begun on February 3, a month after Keys' commitment (T. 577), so Drs. Owens and Platkin had already seen Keys once for 45 minutes before he had received any.

This of course would not be grounds for this Court to order the entry of a directed verdict on the insanity issue, even if there was misconduct. We think there was not.

(a) It is claimed the prosecutor was bound not to cross-examine the psychologist on the basis of his findings. This, of course, is contrary to this Court's decisions (cited *supra*) which establish that the jury is not bound by expert testimony. While at one point the prosecutor did say "Maybe I'm crazy Doctor," this was simply an unfelicitous way of asking the witness whether many people might interpret the ink blots in the same manner and whether the interpretation given did not appear normal. And when an objection was made the judge said it was "well taken," which certainly conveyed to the jury the idea that what the prosecutor said was improper. So the error, if any, was cured. The same is true of the prosecutor's question about the projective drawing tests, "What you are saying is he is just not a good artist." Surely the prosecutor was not forbidden to inquire into the basis of Dr. Stammeyer's conclusions and to ask him whether the drawing in question reflected something more than artistic ineptitude. Moreover, if this was error, it was harmless. See *Hawkins v. United States*, 114 U.S. App. D.C. 44, 310 F. 2d 849, 852-853 (1962) (Judge's questioning of psychiatrist); cf. *Hall v. United States*, 84 U.S. App. D.C. 209, 171 F. 2d 347, 350 (1948).*

(b) The prosecutor's statement to the jury that "the only thing that anybody says is wrong with him is a personality problem" is questioned because the testimony was that Keys had a personality disorder. Certainly the jury knew what the testimony was on this point, and just before making that statement the prosecutor three times referred to Keys' supposed ailment as a "personality disorder." (T. 683-684.) The statement is not inaccurate anyway. This objection is frivolous.

(c) It is also said that it was error for the prosecutor to question the expert witnesses on the right-wrong test when the defense had not first done so. But the *McDonald* case estab-

* In *Hall* this Court said that jurors "must be credited with enough common sense and discrimination to enable them to evaluate properly conduct and remarks of counsel even when they offend ordinary standards of propriety."

lishes that right-wrong may be inquired into and there is no suggestion in the opinion that the Government may not do so on its own initiative. Notably, in this case the government's inquiries on cross examination elicited some testimony that appellant did *not* know right from wrong (T. 352) and could not have adhered to the right (T. 352, 524-525). This might well have been of very great benefit to him. He later agreed to have the jury charged on this point, expressly approving in advance the precise charge the judge later gave (T. 662-665).²⁵

(d) Next, appellant claims error in refusing to instruct on irresistible impulse along with right-wrong, even if the latter testimony and charge was proper. First, no request for such an instruction was made before the charge, nor was any objection taken thereto before the jury retired, so this point was waived below (Rule 30, F.R. Cr.P.). It was only when the jury returned with a question about the relation between mental illness and productivity that counsel asked the court to charge on irresistible impulse. This was properly refused. If given it might have confused the jury to Keys' detriment. If the judge responded to an inquiry about sanity-productivity by talking about irresistible impulse the jury might have thought that a finding of such impulse was somehow necessary before they could acquit for insanity. Undoubtedly if that charge had been given for the first time at that point there would be serious grounds for objecting to it here.

Moreover, there was not even a scintilla of evidence on irresistible impulse in the record, in our view, but even if there was a scintilla the charge would not have to be given. *McDonald v. United States, supra*. Appellant cites Dr. Dabney's testimony (T. 352-356) but at the cited pages he several times said Keys was *not* irresistibly impelled. All Dr. Hamman said was that he did not know whether Keys might have been irresistibly impelled or not (T. 404-405 ("I would have to say that I don't know")). And the third citation in ap-

²⁵ The charge instructed the jury that "these considerations are not to be regarded in themselves as independently controlling or alternative tests of mental responsibility. They are factors which the jury may take into account in deciding whether the act charged was a product of mental disease or mental defect." (T. 744.) See *McDonald v. United States, supra*.

pellant's brief, to Dr. Stammeyer's testimony (T. 524-525) does not reveal any reference to irresistible impulse at all, but shows instead that the Doctor was giving his views on the second part of the McNaughten formula, *i.e.* that Keys could not have adhered to the right. Finally, it doesn't seem possible that in a *Durham* jurisdiction failure to charge on irresistible impulse could harm the accused, since if the jury thinks there was something like such a factor operating it would surely find mental illness and productivity under the *Durham* test.

(e) It is also said that the prosecutor misled the jury by saying that "all the government doctors at the second conference said that the defendant was obviously malingering." (T. 685.) Appellant says that "if this statement was intended to imply that anyone other than Drs. Platkin and Owens had that impression, it was misleading." (Br. App. at 38.) But appellant should know that no such implication was intended, for just before making that statement the prosecutor had defined what he meant by government doctors, saying "Now, what do the Government doctors say? *That is, those who testified for the Government?*" (T. 684.) And defense counsel surely understood what was meant, and was fearful the jury understood only too well, for in rebuttal he said, "And from his [the prosecutor's] argument, *you would think* that my people, the psychiatrists that I put on the stand, didn't even work for the Government, because he referred to Dobbs, Platkin and Owens as Government's *but not the others.*" (T. 697.) Finally, supposing the statement *did* refer to defense doctors too, three of them did in fact have some question whether Keys was malingering at the second conference, as earlier noted.

(f) Finally, it is said that the prosecutor misled the jury by stating that the mental illness which defense psychiatrists attributed to Keys had not been recognized at St. Elizabeths until 1957. It is difficult to understand how this statement could have harmed appellant, since it conceded that there was such a mental illness and that it was recognized at St. Elizabeths. If anything, the statement would seem to redound to Keys' benefit. Moreover, when counsel objected to this statement, the Judge told the jury that "There is some testimony. I am not sure what it is. The jury will have to remember the

testimony. The jury can pass on whether there was anything said." (T. 715.) This brought to the jury's attention that there was a dispute on the point, and the jury can be expected to resolve such disputes. Indeed, it has been held that just such a statement by the judge cures any error of the sort. See *United States v. Battiato*, 204 F. 2d 717, 719 (C.A. 7, 1953). And the prosecutor had earlier told the jury that "what I say to you * * * is not evidence * * *. The evidence is what you heard from that witness stand, not anything that I may say in talking about the evidence." (T. 670.)

Moreover, if the prosecutor misstated the record (and that is not entirely clear), that was understandable. Dr. Dabney indicated that the nomenclature with respect to this disease had been changed in 1953 and that prior to that time the classification "without disorder" was used when no psychosis was found (T. 332-333). So it is possible that only a mistake of four years was made. And Dr. Hamman (T. 587) gave an answer which did indicate the personality disorders were in the same class as sociopathic personality, which had not been classified as a mental illness at the Hospital before 1957. This response was confusing. Since the statement was not harmful, was cured by the judge's remark and is not clearly a serious misstatement anyway, it cannot be held to have tainted the verdict. "If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 243 (1940); *Dunlop v. United States*, 165 U.S. 486, 498 (1897).

6. It is also claimed that the judge improperly refused to instruct the jury on the doctrine of diminished responsibility. Appellant admits refusal was in accord with decisions of this Court which he cites, and we stand on those decisions here rather than examine, in an already lengthy brief, why those decisions should not be overruled.

III

The trial court's instruction on the presumption of sanity was in exact accord with controlling decisions of this court and the Supreme Court, and the instructions on burden of persuasion and reasonable doubt were not confusing or prejudicial

(The portions of the transcript relating to Argument III are pp. 660-670, 724-770.)

A. The charge on the presumption of sanity

1. The trial court charged the jury that "in determining the insanity issue, you must weigh all of the evidence, including the presumption of sanity which remains in the case and is to be considered by you along with all other evidence on the issue of sanity." (T. 748-749.) Appellant claims that this charge "is in conflict with decisions of this Court * * *," and argues that once the defendant introduces some evidence of insanity the presumption vanishes and the jury should not be told about it. Br. App., at 40, 42-43. On the contrary, this instruction is practically *in haec verba* from *Greene v. United States*, 114 U.S. App. D.C. 266, 314 F. 2d 271, 272 n. 1 (1963), where this Court also rejected the very principle appellant here advocates. The Court there said:

In the charge to the jury the statement was made that when the "presumption of sanity is called into question by evidence which may tend to show he was not [sane] *the presumption vanishes, and is no longer to be considered.*" This was incorrect; it inadvertently overlooked *Davis v. United States*, 160 U.S. 496 at 486-488, 16 S. Ct. 353, 40 L. Ed. 499 (1895), which explicitly held that the presumption of sanity remains in the case and is to be considered by the jury along with all other evidence. [Emphasis the Court's.]

Similarly, in *Durham v. United States*, 94 U.S. App. D.C. 228, 214 F. 2d 862, 868-869 (1954), this Court said that "once the issue of insanity is raised by the introduction of 'some evidence,' so that the presumption of sanity is no longer absolute, it is incumbent upon *the trier of fact* to weigh and consider

'the whole evidence, including that supplied by the presumption of sanity * * * on the issue of 'the capacity in law of the accused to commit' the crime.' [Emphasis added.²⁶] And this principle was reiterated and emphasized in *McDonald v. United States*, 114 U.S. App. D.C. 120, 123, 312 F. 2d 847, 850 (1962), where this Court, holding that the Government need not introduce evidence of insanity in every case where the accused offers some evidence of insanity, however weak, said:

Davis v. United States, 160 U.S. 469, 16 S. Ct. 353, 40 L. Ed. 499, clearly supports this position. There the Supreme Court said that the jury, in considering an insanity plea, must weight all the evidence, including the presumption of sanity. 160 U.S. at 488, 16 S. Ct. at 358. Whether uncontradicted expert testimony overcomes the presumption depends upon its weight and credibility, and weight and credibility ordinarily are for the jury.

If, as *McDonald* holds, the jury is to be told about the presumption of sanity in a case in which the Government does not introduce evidence to rebut the defense evidence of insanity, it must follow that there is no objection to charging the jury on the presumption in a case where, as here, the government does present evidence of sanity.

These decisions also suffice to refute appellant's argument that the supposed "error" in telling the jury about the presumption of sanity was compounded by the judge's characterization of the presumption as "evidence." As the quoted excerpts show, the decisions in *Davis*, *Greene*, *Durham*, and *McDonald* each refers to the presumption as evidence.

In our view appellant has misread the two decisions of this Court which he relies upon.²⁷ Both *Blocker* and *Tatum* contain references to the presumption being weighed along with all other evidence. In light of that it seems plain that when this Court later in the *Blocker* opinion quoted extensive portions of the trial court's instructions which included references

²⁶ See also *Guiteau's Case*, 10 Fed. Rep. 161, 163 (S. Ct. D.C.).

²⁷ *Blocker v. United States*, 110 U.S. App. D.C. 41, 288 F. 2d 853 (1961); *Tatum v. United States*, 88 U.S. App. D.C. 386, 389, 190 F. 2d 612, 615 (1951).

to the presumption vanishing from the case, and suggested that the instructions were correct,²⁸ it was not approving the presumption language. Even a cursory reading of the opinion reveals that the Court was focusing on another problem²⁹ and upon other positions of the quoted charge.³⁰

2. It seems to us that appellant is confusing the role of the presumption in regulating the interjection of the sanity issue into the case with the role the presumption plays in the instructions to the jury. Initially the presumption of sanity excuses the prosecution from the necessity of adducing proof of sanity or of dealing with the issue at all. Once the accused introduces "some evidence" of insanity, the burden on the sanity issue shifts to the government in the sense that it must then prove sanity beyond a reasonable doubt. *McDonald v. United States*, 114 U.S. App. D.C. 120, 122; 312 F. 2d 847, 849 (1962). But merely because the presumption is overcome in *that* procedural sense when some evidence of insanity is introduced, it does not follow that the jury should not be told about it in its evidentiary sense. As *Davis*, *Greene*, *Durham* and *McDonald* make plain, even though the presumption, insofar as it is conclusive on the jury, can be overcome by the accused's adducing some evidence of insanity, it is nonetheless proper to charge the jury that the presumption remains in the case and is to be considered along with all the other evidence. Indeed, *Greene* establishes

²⁸ 110 U.S. App. D.C. 41, 288 F. 2d at 855, 856.

²⁹ We deal with the very problem the *Blocker* court was focusing on in Argument III(B) *infra* pp. 42-50.

³⁰ While it is true, as appellant points out, that the proposed model charge set forth in Judge Burger's dissenting opinion in *Campbell v. United States* included the statement, " * * * that presumption [of sanity] no longer prevails when some evidence develops that he may not be sane * * *," [emphasis added] (113 U.S. App. D.C. 260, 279, 307 F. 2d 597, 616 (1962)), this is not the same thing as holding that the presumption vanishes. Moreover, Judge Burger joined in the *per curiam* opinion in *Greene v. United States*, *supra*, which after *Campbell* explicitly laid down the rule that the jury should be told that they are to consider the presumption along with all other evidence.

that it would be error to charge the jury that the presumption vanishes.²¹

3. Were the question here *de novo* we think the result must be the same. Whether the jury should be told to consider the presumption of sanity cannot be answered without at least some consideration of the test of criminal responsibility in effect in this jurisdiction. Since the first *Durham* decision a defendant may offer practically any kind of testimony, lay and expert, in an effort to establish that his act was the product of mental disease or defect. *Durham* obviously greatly expanded the scope of admissible evidence on this issue, as it was, of course, intended to do. It is therefore much easier for a defendant to raise a jury question on the insanity issue in this jurisdiction than it is elsewhere in the federal system and in practically every state. If, as the Supreme Court held in *Davis*, the jury is to consider the presumption where the *McNaughten* test is employed, it would seem to follow *a fortiori* that the jury ought to be instructed on the presumption where the *Durham* rule controls.

4. Finally, no objection was made to this portion of the charge and it is therefore governed by Rule 30. It is certainly not plain error affecting substantial rights to charge a jury in exact accordance with decisions of this Court. Hence this point is not properly here for review in any event.

B. The charge on the burden of persuasion

Appellant also claims that other portions of the judge's charge were "prejudicially confusing." It is urged that while

²¹ The excerpt from Judge Holtzoff's opinion in *United States v. Fielding*, 148 F. Supp. 46, 52 (D.D.C. 1957), *rev'd on other grounds*, 102 U.S. App. D.C. 167, 251 F. 2d 878 (1957), quoted in Br. App., at 41, deals with the role of the presumption in regulating the interjection of the sanity issue into the case; it does not deal with the proper role of the presumption in charging the jury. The same is true of the Fourth and Tenth Circuit cases cited by appellant, *Hall v. United States*, 295 F. 2d 26 (C.A. 4, 1961), and *Fitts v. United States*, 284 F. 2d 108, 112 (C.A. 10, 1960). While *Fitts* does contain a reference to the presumption disappearing, this was said merely to show that the introduction of some evidence by the accused of insanity requires the government to prove sanity beyond a reasonable doubt. Moreover, insofar as *Fitts* suggests that any time some evidence of insanity is offered the government must in every case offer counter-evidence, without regard to the presumption of sanity, or suffer a directed verdict of acquittal for insanity, it is contrary to *McDonald v. United States*, *supra*.

at various points in the charge the jury was correctly instructed that the Government had to prove sanity or non-productivity beyond a reasonable doubt, other portions of the charge were "ambiguous" and "may have indicated to some jurors that in order to find defendant not guilty by reason of insanity it must be affirmatively determined that the acts were produced by mental illness." Br. App., at 43. The portions of the charge objected to here (but not below) contain statements that for a person to be relieved of responsibility for crime "he *must* have" suffered from mental disease and "his act *must* have been" the product of disease (T. 742); that the "issue of fact which you are called upon to decide * * * is whether the accused *was* suffering from a mental disease;" that "product of" means that the facts are "such as to justify reasonably" the conclusion that "but for the mental disease * * * the acts would not have been committed" (T. 743, 744); and that the productivity question arises if the jury determines "that the defendant *was* suffering from a mental illness * * *." (T. 765).

1. In *Redfield v. United States*, 117 U.S. App. D.C. 231, 328 F. 2d 532 (1964) the trial judge had instructed the jury, among other things, that before it could acquit for insanity it "must find" that the defendant had a mental disease or defect and that it had caused the act charged. But this Court refused to reverse, stating (117 U.S. App. D.C. at 232, 328 F. 2d at 533):

But upon consideration of the instructions as a whole we think it clear that on the issue of insanity the jury understood that the burden was not upon the appellant and that the Government must prove beyond a reasonable doubt that he had no mental disease or defect, or, if he did, that the acts charged were not the product of such disease or defect. The situation is distinguished from that which led to reversal in *Blocker v. United States*, 110 U.S. App. D.C. 41, 43, 288 F. 2d 853, 855 (1951) [sic], *Isaac v. United States*, 109 U.S. App. D.C. 34, 36-37, 284 F. 2d 168, 170-171 (1960), and *Carter v. United States*, 102 U.S. App. D.C. 227, 233, 252 F. 2d 608, 614 (1957) [emphasis added].

To the same effect, on the very question of confusing instructions on the burden of persuasion as to insanity, see also *Carey*

v. *United States*, 111 U.S. App. D.C. 300, 296 F. 2d 422, 426 (1961); and *Martin v. United States*, 109 U.S. App. D.C. 83, 284 F. 2d 217, 220-221 (1960).

Indeed, in *Bradley v. United States*, 102 U.S. App. D.C. 17, 249 F. 2d 922, 924-925 (1957), a charge practically identical to the charge here objected to by appellant was held not grounds for reversal when not objected to below. Moreover, this Court had "a lack of conviction that the trial judge erred" and said that "the excerpt from the charge seems clear and unequivocal." 102 U.S. App. D.C. at 20, 249 F. 2d at 925. More recently, in the third *Blocker* case, *Blocker v. United States*, 116 U.S. App. D.C. 78, 320 F. 2d 800 (1963), the judge charged the jury at one point that "if the crime itself *was* the product of the mental disease or mental defect then, and *only then*, the defendant is not responsible for his criminal act." [Emphasis added.] 116 U.S. App. D.C. at 79, 320 F. 2d at 801 n. 1. Apparently it was to this portion of the charge that *Blocker* objected on appeal, but this Court held that the "relevant portions convey the correct rules," and "the matters about which appellant complains do not affect his substantial rights under Rule 52(b), * * *." *Ibid.* And see *Simpson v. United States*, 116 U.S. App. D.C. 81, 320 F. 2d 803 (1963), where the instruction quoted might be thought subject to the same infirmities alleged here, but this Court failed to notice it as plain error.

Appellant relies upon *Blocker v. United States*, 110 U.S. App. D.C. 41, 288 F. 2d 853 (1961), and ²² *Isaac v. United States*, 109 U.S. App. D.C. 34, 284 F. 2d 168 (1960), two decisions in which this Court did reverse convictions because of confusing instructions, apparently objected to at the trial, on the burden of persuasion on the issue of insanity *where the death penalty had been imposed*. In *Blocker* the conviction was reversed because the judge had once charged the jury correctly that the government had the burden of proving sanity beyond a reasonable doubt, had then given an instruction using the words "where it is found," "you must find," and "if you find" with reference to insanity and productivity, and had finally given an approved instruction. In *Isaac* the conviction was reversed on another ground, the Court also observing that the charge

²² The second *Blocker* case.

was ambiguous regarding who had the burden of persuasion on the insanity issue. And *Carter v. United States*, 102 U.S. App. D.C. 227, 252 F. 2d 608 (1957), not cited by appellant, reversed a death sentence because, *inter alia*, confusing instructions were given on this point, but the Court cautioned that "the purport of the whole of the instructions is the controlling consideration." 102 U.S. App. D.C. at 227, 252 F. 2d at 614. See also *Wright v. United States*, 102 U.S. App. D.C. 36, 250 F. 2d 4, 11 (1957).³³ It should be noted, moreover, that in none of the cases where convictions were reversed was the point urged for the first time on appeal.

From this review of the decisions it seems plain enough that no absolute rule governs this matter, especially where the accused has not been sentenced to death and where no objection to the charge was made below. As *Redfield* and others decision hold with respect to this very question, "[i]t is axiomatic that the charge to the jury must be read as a whole." *Kinard v. United States*, 69 U.S. App. D.C. 322, 101 F. 2d 246, 247 (1938). Whether a charge is proper depends " * * * on a consideration of the instructions as a whole not in fragments detached and isolated from their explanations and qualifications." *Schaefer v. United States*, 251 U.S. 466, 471 (1920). Tested by the foregoing precepts, the charge given below adequately informed the jury that the burden was on the Government to persuade the jury beyond a reasonable doubt that Keys was not suffering from a mental disease or that, if he might have been, that the act was not a product of that disease.

2. The fact is that the trial judge told this jury no less than fourteen times that the Government had the burden of persuading them of sanity or non-productivity beyond a reasonable doubt. The first time he discussed this matter he said that (T. 740):

[B]ecause the issue of the Defendant's mental capacity has been raised, you must also find that the Government has proved beyond a reasonable doubt either that

³³ The death penalty was not imposed in *Wright* but there were multiple grounds for reversal.

the defendant was not suffering from a mental disease or mental defect at the time of the commission of the offense, or that the offense was not the product of any mental disease or mental defect which the Defendant might have had at the time of the offense.

The judge said this again one page later (T. 741). It was only then that he used the expressions "must have suffered from a mental disease" and "must have been the product of that mental disease" and it is clear from the context that the Judge was there speaking, *not* about the burden of persuasion on this issue, *but about the substantive law of insanity*. This he made clear almost immediately thereafter (T. 742-743) where he said, "[t]his is the *legal standard* which you should apply * * * ." The legal standard—the substantive law of insanity—not the rule on who must prove what to what degree of conviction. Viewed in that light it cannot be said that this language was incorrect. It must have been perfectly clear to the jury that the judge was not contradicting here what he had twice said only one and two pages earlier in the transcript.

After making the statement about productivity to which appellant objects, but which also was directed to the substantive law of insanity (T. 743), the judge made the statement quoted at the top of page 44 of appellant's brief, to which he objects. We quote the statement in full, omitting nothing, and italicizing what appellant failed to quote (T. 744-745):

The issue of fact which you are called upon to decide with respect to the defense of insanity is whether the accused was suffering from a mental disease or a mental defect, as I have defined these terms to you, and if you find that he was so suffering, whether there was a relationship between such disease or defect and the alleged criminal act, and if so, whether that relationship was such as to justify a reasonable inference that the accused would not have committed the act if he had not had the mental disease or mental defect. *Unless you find beyond a reasonable doubt that the Defendant was not suffering from a diseased or defective mental condition, or if he was that the criminal act was not a product of*

such condition, you must find the Defendant not guilty by reason of insanity. On the other hand, if you find beyond a reasonable doubt that at the time of the act charged the Defendant was not suffering from a mental disease or mental defect, or if he was suffering from a mental disease or mental defect that the act was not the product of that mental condition, your deliberations as to the Defendant's criminal responsibility would be concluded for in that case he would be legally responsible for whatever act or acts you find he committed. Under those circumstances, you may find him guilty if you are satisfied beyond a reasonable doubt that he committed the offenses charged in the indictment.

Assuming that the "was suffering" and "was a relationship" language is objectionable, this paragraph, read as a whole, certainly reconciled any possible conflict and the jury surely could not have been in doubt after that.

3. But that is not the whole story yet. The judge gave the proper charge many times thereafter. He said it was the jury's "duty" to weigh all the evidence "and determine *the ultimate issue* of whether the Government has established beyond a reasonable doubt that the Defendant was not suffering from a [mental disease or defect] or that the act was not the product of such condition if one existed." (T. 745.) He referred later to the Government's "burden of proof" on the insanity issue (T. 748); he told them "[b]y way of summary" that the Government must prove sanity or nonproductivity beyond a reasonable doubt (T. 749); he told them they could convict of first degree murder "if you also find" that the Government proved sanity or nonproductivity beyond a reasonable doubt (T. 749); that they could convict of second degree murder "if you further find" that the Government had proved sanity or nonproductivity beyond a reasonable doubt" (T. 750). He said if the Government proved all the elements of either first or second degree murder or manslaughter, "but you have a reasonable doubt as to whether the offense was the product of a mental disease or defect * * *, then you must find the Defendant not guilty by reason of insanity" (T. 751). He

told them on the other hand, that if the Government had proved sanity or nonproductivity beyond a reasonable doubt, they could convict of first or second degree murder or manslaughter (T. 751). He followed precisely the same formula in charging on the second and third counts of the indictments dealing with assault with a deadly weapon, referring four times to the burden on the Government on the insanity issue (T. 752, 753, 754).

Besides all of that, during the main charge the Judge several times expressed the reasonable doubt rule in general terms which plainly covered the insanity element as well as other elements (T. 727, 728, 729). Defense counsel in his closing argument told the jury that it is "the obligation of the Government * * * [t]o prove beyond a reasonable doubt that the man was sane at the time that the action was done, that he had no mental illness, that the mental illness was not the producing cause of it." (T. 702-703.) And the prosecutor in his rebuttal argument said (T. 708):

Now, it is true that the defense does not have to—
doesn't have a burden of showing insanity. The Government has the burden of proving sanity beyond a reasonable doubt.

That made fourteen ^{different} ~~different~~ specific references by the judge to the burden on the government on the insanity issue, and two by counsel, by the time the jury retired and before it asked the court to repeat the charge on the "[r]elationship of serious personality problem and productivity with respect to the crime charged" (T. 764). The court and counsel quite apparently understood this question to go to the nexus between the question of sanity and the question of productivity, and, out of the hearing of the jury, counsel assented to what the judge proposed to say (except in one particular not relevant here) (T. 764). So the judge then instructed the jury that if it "is your determination that the Defendant was suffering from a mental disease, then the question of productivity arises," and he also repeated his earlier instruction that to be relieved of responsibility a person "must" have suffered from disease and his act "must" have been the product thereof

(T. 765). He also repeated earlier portions on productivity (T. 765-766). No objection was made by the defense, and we observe again that this language went to the substantive law of insanity, not to the burden of persuasion.

One juror also asked for a definition of "beyond a reasonable doubt", (T. 760), and out of the hearing of the jury defense counsel agreed "a hundred percent" with the judge's suggestion that he "should merely repeat" his charge on "what constitutes reasonable doubt." (T. 760.) The judge then recharged the jury on reasonable doubt, without relating it to the insanity issue, as the appellant notes. Defense counsel then said, "I have nothing further."

4. We cannot believe, in view of the plethora of earlier very clear instructions and explanations relating reasonable doubt and insanity, that the jury could have been misled by the supplementary instructions. Indeed, it is not clear that the question about reasonable doubt had anything to do with the insanity issue, since the two questions did not come to the bench at the same time, the reasonable doubt question apparently came from only one juror, and it asked for only a definition, not for any explanation of the nexus between that formula and insanity. When the jury wanted an explanation on the relation between two problems, it knew how to ask for it, as it did on the sanity-productivity issue.³⁴ But if, as appellant suggests, the jury's concern about what reasonable doubt meant was related to its concern about insanity, that would only go to prove the opposite of his contention; it would

³⁴ The judge's charge on first degree murder with respect to purpose, intent, premeditation and deliberation contained some language open to the same objection as is made to the insanity charge, yet no one would suggest that the jury was misled about the burden of persuasion on those elements. Thus, the court said, for example, "If there is no purpose or intent to kill, or if there is a purpose and intent to kill but no premeditation and deliberation, then the unlawful killing, if committed with malice, constitutes murder in the second degree rather than murder in the first degree." (T. 737-738.)

Of course, it may be objected that the jury should have been told that if the government failed to prove purpose or intent and premeditation and deliberation beyond a reasonable doubt, it should acquit Keys of first degree murder, instead of being told (as it was) that it should acquit of first degree if "there is no purpose or intent", etc. (See also T. 737, 738). The judge was of course discussing the substantive law of murder, not the burden of persuasion, which he elsewhere discussed many times.

prove, in short, that the jury well knew that the reasonable doubt burden applied to the insanity defense as well. On his own assumption, therefore, his argument must fail.

C. The charge on the meaning of reasonable doubt

It is also urged that the trial judge erred in his explanation of the meaning of reasonable doubt. Br. App., at 45. It is claimed that reasonable doubt should have been explained in terms of such doubt as would cause one to *hesitate* to act, rather than as something the jury would be willing to act upon. Not only was no objection taken to this portion of the charge, but as we have pointed out *supra*, when a juror asked for a definition of reasonable doubt the court asked counsel if he should repeat what he had said before and counsel said he agreed with that one hundred percent.

Appellant points to *Jones v. United States*, — U.S. App. D.C. —, — F. 2d — (October 15, 1964), slip op. p. 5, where this Court said that the charge on reasonable doubt "should have been in terms of the kind of doubt that would make a person *hesitate to act* * * * rather than the kind on which he would be *willing to act*." This Court did not reverse on that point in *Jones*, but merely added "a word" about this matter, having reversed on other grounds. And in *Holland v. United States*, 348 U.S. 121, 140 (1954), cited in the *Jones* opinion, where a similar charge had been given, the Supreme Court affirmed a criminal conviction and expressly held that this kind of charge did not constitute reversible error, if error it was. The Court specifically found that "the instruction as given was not of the type that could mislead the jury into finding no reasonable doubt when in fact there was some." *Ibid*. Finally, such an error surely cannot be held to have affected substantial rights within the meaning of Rule 52(b).

IV. No error was committed when the jury was polled

(The portions of the transcript relating to Argument IV are pp. 666-667, 754-756, 771-781.)

Appellant contends that the purpose of the jury poll was subverted when the court returned the verdict forms to the jury, said that each juror should be sure to get his own form, but failed to advise them of their right to dissent from the

previously-announced verdict. We submit that the judge's comment just before the poll that the forms had "no official significance" (T. 771) informed the jury that they were not bound by anything thereon. And when counsel asked for a poll the court said that it had given the forms to the jurors "so they *might refer* to them on being polled." (T. 772.) This is not the language of command; and from it the jury must have understood that it was not bound by anything on the forms. Moreover, counsel expressly assented to redistribution of the forms (T. 772) and made no objection to the court's remark that each juror should get his own form back (T. 772). Hence there is nothing here for review on this point.

Beyond that, the Rules of Criminal Procedure do not require that the district court advise jurors that they are free, upon being polled, to repudiate the verdict which has been announced by the foreman. Nor has any federal case been located by the Government or the appellant which suggests such a practice. The court has discretion to determine the manner in which the jury is to be polled. *Shibley v. United States*, 237 F. 2d 327, 334 (C.A. 9, 1956) *cert. den.* 352 U.S. 873 *cert. den.* 352 U.S. 919. See also, Annot., 71 ALR 2d 619 at 661. There are in fact certain advantages to the defendant to having the form before the jury during the poll. By enabling each juror to consult the list of alternative verdicts, the court's action actually made it easier for them to dissent from the announced verdict. This was not an uncomplicated case where upon being polled the jurors could answer simply "guilty" or "not guilty." There were three different counts, and on the first count alone there were seven possible verdicts. On the other two counts there were three possible verdicts. The form which the court had prepared was intended to help the jurors untangle these various possibilities. Where the possible verdicts are so numerous, it is unlikely that in the case of split verdicts a juror could remember the various alternatives without such aid. On being polled he would thus be inclined to go along with the announced verdict which was fresh in his mind. Having before him a form listing all possibilities would, if anything, encourage him to canvass the possibilities again and reach a new conclusion.

Moreover, by requiring that each juror be given his own verdict slip, the district judge assured that each juror would have before him any notations or markings he may have made during his deliberations. The record shows that on at least one form there were erasures. When this form was returned to the proper juror, it assured that it would call to his mind any indecision he may have had. Also, this practice insulates the jurors from any influence which might otherwise be exerted by marks or erasures on another's verdict slip.

In any event, the record in the case makes clear that the jurors understood that they were being afforded an opportunity to state their individual verdicts. The Court expressly explained to the jury that "as your name is called, you will give your individual verdict with respect to the three counts of the indictment" (R. 772). Two jurors in fact announced a verdict which differed from that which had been announced by the foreman. Jurors Howard and Gair announced their verdicts to be guilty of murder in the first degree, with recommendation of life imprisonment and then explained that the jury as a whole was unable to agree as to punishment (R. 773-774, 777). This refutes appellant's contention that the jurors felt they were obliged to parrot what they had marked on the verdict slips.²⁵

²⁵ The court's efforts to clarify Juror Yachler's and Juror Diebeler's verdicts do not compel a different conclusion. These jurors first announced their verdicts as being "guilty of murder in the first degree" (R. 774, 778). This was one of the possible verdicts under the first count. However, three other possible verdicts under that count began with the same language. In order to clarify the verdict, the judge asked if this was the "total verdict", which in no way intimidated the juror. Where, as here, the meaning of the juror's answer is ambiguous, further interrogation to ascertain intent is clearly permissible. *Harrison v. Paramount Pictures*, 115 F. Supp. 312, 315 (E.D. Pa. 1953, Annotation, 49 A.L.R. 2d 619, 662; compare *Bruce v. Chestnut Farms-Chevy Chase Dairy*, 75 U.S. App. D.C. 192, 126 F. 2d 224 (C.A.D.C. 1942). Also, Juror Yachler announced her verdict under count 2 as being "guilty of murder", not a possible verdict under this count, which was for assault with a dangerous weapon. The judge simply pointed out he was asking for the verdict under Count 2.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the conviction should be affirmed.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID A. KEYS, JR.,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

United States Court of Appeals
for the District of Columbia Circuit

No. 18,786

FILED JAN 4 1965

Nathan J. Paulson
CLERK

REPLY BRIEF FOR APPELLANT

Since no new matter has been raised in the Government's brief, appellant deems it unnecessary to burden the Court at this stage with more than a few written comments.

In addition to resorting, in part, to dubious reasoning and inapposite principles in support of the judgment below, the Government reframed Questions 1 and 4 so as to eliminate vital factual predicates of those issues.

As for the role of the presumption of sanity involved in point 3 on this appeal, appellant concedes that there are contradictory dicta in several of this Court's decisions. In further support of appellant's contention (Opening Brief, pp. 40-43) that it was prejudicial error for the trial court to have instructed the jury to take account of the presumption of sanity together with all other evidence adduced on the issue of appellant's mental condition, attention is invited to the reasoning contained in the following additional cases and authorities:

Agnew v. United States, 165 U.S. 36, 51-52 (1897).
Holt v. United States, 218 U.S. 245, 253 (1910).
Del Vecchio v. Bowers, 296 U.S. 280, 286 (1935).
New York Life Insurance Co. v. Gamer, 303 U.S. 161, 171-172 (1938).
Harlem Taxicab Association v. Nemesh, 89 U.S. App. D.C. 123, 124, 191 F.2d 459, 461 (1951).

State v. Green, 6 P. 2d 177 (Utah 1931).
People v. Monroe, 154 N.E. 2d 225 (Ill. 1958).
Farrell v. State, 101 So. 2d 130 (Fla. 1958).
Bradford v. State, 200 A.2d 150, 152-155 (Md. 1964).
A.L.I., MODEL CODE OF EVIDENCE, rule 704 (1942).
Thayer, A Preliminary Treatise on Evidence At the Common Law, pp. 314,
336-39, 551-76 (1898).
Weihsfen, Mental Disorder as a Criminal Offense 219 (1954).
Underhill, Criminal Evidence 66 (5th ed. 1956).

Respectfully submitted,


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By Appointment of this Court

January 4, 1965

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Brief for Appellant has been served on David C. Acheson, Esq., U. S. Attorney, by delivering a copy to his office at the United States Courthouse, Washington, D. C., on this 4th day of January, 1965.


Harold David Cohen

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 20 1965

DAVID A. KEYS, JR.,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

Nathan J. Paulson
CLERK

No. 18,786

PETITION FOR REHEARING EN BANC

Appellant, by his Court-appointed counsel, respectfully requests a rehearing en banc of the decision of the Court rendered in this case on April 29, 1965, by Judges Danaher, Burger and McGowan (the latter concurring in the result). The decision affirmed appellant's conviction for murder in the first degree (under which he was sentenced to life imprisonment) and for assault with a deadly weapon. In support of this petition, the following is stated.

I.

1. In the opinion by Judge Burger, the Court concluded that it was proper for the trial court to instruct the jury that "in determining the insanity issue, you must weigh all the evidence, including the presumption of sanity which remains in the case and is to be considered by you along with all the other evidence on the issue of sanity." In other cases, this Court and the District Court have taken a contrary position on the proper

role of the presumption of sanity. In view of the intra-Circuit diversity of views on this important question, it is respectfully submitted that it should be resolved by the full Court.

2. In Blocker v. United States, 110 U.S. App. D.C. 41, 43, 288 F.2d 853, 855 (1961) (en banc), the Court approved as "in accordance with the law" an instruction which stated that "Basically, there is a presumption that all people are sane. * * * But, when there is some evidence of a mental disorder, as here in this case, then the presumption of sanity . . . vanishes from the case." On the other hand, Judge Miller's dissenting opinion (con-
curred in by Judge Bastian) stated that the presumption does not disappear but is to be considered by the jury in connection with evidence on the subject (id. at 65, 288 F.2d at 877). The latter view finds support in Durham v. United States, 94 U.S. App. D.C. 228, 235, 214 F.2d 862, 869 (1954); McDonald v. United States, 124 U.S. App. D.C. 120, 123, 312 F.2d 847, 850 (1962); and Greene v. United States, 114 U.S. App. D.C. 266, 267 n.1, 314 F.2d 271, 272 n.1 (1963) (dictum). ^{1/} It appears, however, that in none of the cases cited above was the precise point on which en banc review is here sought fully briefed or argued.

3. Other courts as well as leading authorities in the field of evidence have stated that the initial presumption of sanity is "dislodged," "disappears" or "vanishes" when evidence on the subject is adduced. ^{2/} To

^{1/} In both the McDonald and Greene cases, the instructions of the District Court reflected a different view of the role of the presumption of sanity than was expressed by the trial judge in the case at bar.

^{2/} Fitts v. United States, 284 F.2d 108, 112 (10th Cir. 1960); Hall v. United States, 295 F.2d 26, 30 (4th Cir. 1961); Thayer, A Preliminary Treatise on Evidence at the Common Law 314, 336-39, 551-76 (1898); 9 Wigmore, Evidence 289, 359-60 (3rd ed. 1940); 1 Jones, Evidence 201, 204-05 (5th ed. 1958); Underhill, Criminal Evidence 66 (5th ed. 1956). See also, Weiheofen, Mental Disorder as a Criminal Defense 219 (1954); A.L.I., MODEL CODE OF EVIDENCE, Rule 704 (1942).

allow a jury to be instructed that the presumption remains in the case and is to be treated as evidence has been held to be a prejudicial dilution of the burden of proof of criminal responsibility which should rest on the prosecutor. In Fitts v. United States, 284 F.2d 108, 112 (10th Cir. 1960), the Court stated:

"The presumption of sanity is a rule of law which stands in the place of evidence, in the absence of evidence to the contrary. When, however, evidence of insanity is produced, from whatever source, the presumption of sanity disappears, and the mental capacity of the accused to commit the crime becomes an essential element to be proven by competent evidence beyond a reasonable doubt.

* * *

"We think the question of the sufficiency of the evidence to dissipate the presumption of sanity and raise the issue of insanity is one of law for the court to decide in the first instance." [Emphasis added.] 3/

As summarized in 1 Jones, Evidence 204-05 (5th ed. 1958), "The prevailing view [with respect to presumptions generally] . . . has been that when opposing evidence comes into the case, the presumption, having served its purpose, is no longer operative and the issue is determined on the evidence just as though no presumption had ever existed." 4/

3/ The Fitts decision was approved in Phillips v. United States, 311 F.2d 204 (10th Cir. 1962). See Coffman v. United States, 290 F.2d 212, 215 (10th Cir. 1961).

4/ For state decisions taking this position specifically in relation to the presumption of sanity, see, e.g., State v. Green, 6 P.2d 177 (Utah 1931); People v. Monroe, 154 N.E.2d 225 (Ill. 1958); Farrell v. State, 101 So.2d 130 (Fla. 1958); Bradford v. State, 200 A.2d 150, 154 (Md. 1964).

4. Those members of this Court who have taken the position that the presumption is evidence to be considered by the jury have cited Davis v. United States, 160 U.S. 469 (1895), in support of their view. But the main thrust of Davis was on another point, and the precise issue of the role of the presumption was not squarely presented. ^{5/} More recent decisions of the Supreme Court dealing with similar presumptions make it doubtful that the Court subscribes to the view that the presumption of sanity is evidence to be weighed by the jury. See, e.g., Del Vecchio v. Bowers, 296 U.S. 280, 286 (1935), and New York Life Insurance Co. v. Gamer, 303 U.S. 161, 171 (1938). In the latter case, the Court said:

" . . . The evidence being sufficient to sustain a finding that the death was not due to accident, there was no foundation of fact for the application of the presumption; and the case stood for decision by the jury upon the evidence unaffected by the rule that from the fact of violent death, there being nothing to show the contrary, accidental death will be presumed. The presumption is not evidence and may not be given weight as evidence." [Emphasis added.] ^{6/}

5. If, upon reconsideration, the Court should hold that the presumption of sanity became functus officio when evidence sufficient to raise a jury question of appellant's mental condition was received, and that the case should have gone to the jury without the prejudicial confusion of a presumption, it is believed that the practical result would be a change in the judgment of this Court.

^{5/} The ambiguity of the Davis holding so far as the role of the presumption is concerned is indicated by the fact that, in contrast to the use made of the Davis decision in the instant case, the 10th Circuit in the Fitts case, supra, cited Davis for the proposition that the presumption vanishes on introductory evidence and the mental capacity of the accused must be proved by competent evidence - which, obviously, does not include the presumption.

^{6/} To the same effect, see Harlem Taxicab Ass'n. v. Nemesh, 89 U.S. App. D.C. 123, 124, 191 F.2d 459, 461 (1951).

II.

6. In affirming appellant's convictions, the Court either failed to consider or rejected sub silentio appellant's argument that the trial court erred in defining reasonable doubt in terms of the absence of an abiding conviction which the jury would be willing to rely upon in determining the more weighty and important affairs of their own everyday lives, rather than in terms of the kind of doubt that would make them hesitate to act. Appellant's contention that the instruction was erroneous was in line with the views expressed by another panel of this Court in Jones v. United States, _____ U.S. App. D.C. _____, 338 F.2d 553, 555 (1964), and Scurry v. United States, No. 18,633, decided April 15, 1965.

7. In defining reasonable doubt, the trial court in the instant case stated:

"If after a fair comparison of all the evidence you are not satisfied of the guilt of the Defendant, then you have a reasonable doubt and should find him not guilty. On the other hand, if after a fair comparison of all the evidence you have an abiding conviction of the guilt of the Defendant, such a conviction as you would be willing to rely upon in determining the more weighty and important affairs of your own everyday lives, then you do not have a reasonable doubt and may find him guilty."

In the Scurry case, an instruction almost identical to the one quoted above was held to be "not in accord with the law," and the Court stated:

"Being convinced beyond a reasonable doubt cannot be equated with being 'willing to act * * * in the more weighty and important matters in your own affairs.' A prudent person called upon to act in an important business or family matter would certainly gravely weigh the often neatly balanced considerations and risks tending in both directions. But, in making and acting on a judgment after so doing, such a person would not necessarily be convinced beyond a reasonable doubt that he had made the right judgment. Human experience, unfortunately, is to the contrary."

"The jury, on the other hand, is prohibited from convicting unless it can say that beyond a reasonable doubt the defendant is guilty as charged. Thus there is a substantial difference between a juror's verdict of guilt beyond a reasonable doubt and a person making a judgment in a matter of personal importance to him. To equate the two in the juror's mind is to deny the defendant the benefit of a reasonable doubt."

8. In view of the conflicting views of two panels of the Court on the correctness of the kind of instruction given in the case at bar, it is respectfully submitted that consideration of the point by the full Court is warranted.

III.

9. We recognize that in the absence of conflicting views or other special circumstances rehearing is normally not available merely to present matters on which the Court has once deliberated and spoken. We are constrained, nevertheless, to suggest a third reason for reconsideration by the full Court. The rejection in Judge Burger's opinion of appellant's contention that plain error was committed by the prosecutor in warning the jury that a verdict of not guilty would in effect result in appellant's early release from a mental hospital is, we believe, inconsistent with the tenor of other decisions of this Court.

10. While it is true that the defense counsel opened up the subject of the effect of a verdict of acquittal by reason of insanity, and while it is also true that he did not object to the prosecutor's request for permission to tell the jury that, contrary to defense counsel's comments, the confinement "may not necessarily be a long, long time," the critical factor is that the prosecutor did not limit his comments to rebuttal. Rather, he went beyond

the point made by defense counsel and urged the jury to take into account in "thinking about" the duration of appellant's confinement the fact that the medical officials in "overall control at the hospital, at the maximum security division," namely, as he previously specified, Dr. Owens, who "runs the show over there," and Dr. Platkin, his "next in command," had already expressed the opinion that appellant is not mentally ill. The obvious purpose of this argument by the prosecutor was to engender in the minds of the jurors the fear that, since the hospital authorities who would be directly concerned with determining appellant's qualifications for release had already found him free of mental illness, he would be released forthwith if a verdict of not guilty by reason of insanity were returned. Judge Burger's opinion justifies the prosecutor's argument as "rebuttal" or "comparable prosecution rebuttal" ^{7/} despite the crucial distinction that the prosecutor clearly implied not only that a short confinement might follow an acquittal for insanity, but that it would in fact be the practical result of such a verdict.

11. In Blunt v. United States, 100 U.S. App. D.C. 266, 278, 244 F.2d 355, 367 (1957), another panel of this Court stated that " . . . nothing justifies a judge in warning a jury that, if they acquit the accused, they will be releasing a dangerous man to prey upon society." (Emphasis added.) It is respectfully submitted that a review by the full Court may well result

^{7/} Judge Burger's opinion does not refer to the fact that counsel appointed by this Court did not represent the defendant in the trial below. Some confusion in this respect may result from the fact that in the final paragraph of the opinion the present tense is used in the statement that defense counsel "believes that his [erroneous] tactics may have gone awry." The record does not reveal the beliefs of trial counsel either way on this point. The contention that in any event the prosecutor's remarks constituted reversible error was advanced by counsel appointed by this Court.

in the correlative principle that nothing justifies the prosecutor in conveying a similar warning to the jury - as he obviously did in the instant case.

12. Since one or more members of the jury might well have been influenced not to vote for acquittal on the ground of insanity despite a reasonable doubt of appellant's sanity for fear, induced by the prosecutor, that such a verdict would result in the release of appellant from custody within a short time, the error involved in the prosecutor's statements is, we submit, so plain and so prejudicial as to call for the application of Rule 52(b) of the Federal Rules of Criminal Procedure.

Respectfully submitted,



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May 20, 1965

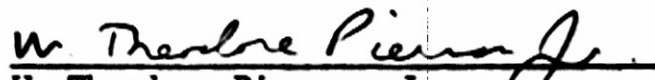
CERTIFICATE OF GOOD FAITH

I hereby certify that the foregoing Petition is submitted in good faith and not for delay.


Harold David Cohen

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Rehearing En Banc has been served on David C. Acheson, Esq., U.S. Attorney, by delivering a copy by hand to his office at the United States Courthouse, Washington, D. C. on this 20th day of May, 1965.


W. Theodore Pierson, Jr.